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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner*,

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND FOUR APPENDICES

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January 15, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. .....

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY (formerly Fidelity and Columbia Trust Company), Joint Administrators with the Will Annexed of the ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND FOUR APPENDICES

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Patricia R. Smith, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 17, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court was filed and entered on March 4, 1961, a copy of the said opinion is contained in the Record as printed for the United States Court of Appeals for the Sixth Circuit, which was printed in the Transcript of Record, Volume II, which was filed as an Appendix on June 25, 1963, with the Brief for the Defendant-Petitioner in the United States Court of Appeals for the Sixth Circuit, and is filed herewith and marked Petitioner's Appendix C hereto, see R. Vol. II, pp. 1607a-1629a, is reported in 192 Federal Supplement 396 (1961). A timely Petition For Rehearing was filed by Patricia R. Smith, on April 3, 1961, printed in Appendix C hereto, R. Vol. II, pp. 1646a-1691a. The opinion of the United States Court of Appeals for the Sixth Circuit, was filed and entered on April 17, 1964, and is printed in Appendix D hereto, Transcript of Record Volume III, pp. 2369a-2381a, is reported in 330 F. 2d 483 (1964).

The judgments of the District Court, granted on the Respondents, the two Trust Companies' Motions For Summary Judgments were filed and entered on November 9, 1962, and is printed in Appendix C hereto, R. Vol. II, pp. 2092a-2093a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed, was filed and entered on April 17, 1964, printed in Appendix D hereto, R. Vol. III, pp. 2368a-2369a.

A timely Petition For Rehearing was filed by the Petitioner Patricia R. Smith, on July 6, 1964, printed in Appendix D hereto, R. Vol. III, pp. 2446a-2575a, and was denied and an Order entered thereon, on August 19, 1964, R. Vol. III, p. 2576a, and a second opinion of the Circuit Court of Appeals was filed on the denial of Patricia R. Smith's Petition For Rehearing on August 19, 1964, consisting of two pages, printed in Appendix D hereto, R. Vol. III, pp. 2576a-2579a.

An order granting an extension of time within which the Petitioner Patricia R. Smith could file a Petition For Writ of Certiorari in this Court, was filed and entered in this Court on November 6, 1964, extending the time to January 16, 1965.

The statutory provision believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari, is invoked under 28 United States Code, Section 1254(1), on the grounds that the Court of Appeals has (1) decided important questions of state law in a way not in accord with the applicable law of Kentucky and (2) has sanctioned such a departure by a lower court from the accepted and usual course of judicial procedure as to conflict with applicable law and to call for an exercise of this Court's power of supervision.

(3) By the rulings of the District Court, which was upheld by the Court of Appeals, the rights of the Petitioner Patricia R. Smith, under the Fourteenth Amendment to the Constitution of the United States, have been violated, and especially that portion thereof which authorizes this Court by writ of certiorari to review final judgments of a Circuit Court of Appeals, wherein a Federal question is involved, and wherein it states that,

> "No State Shall Make Or Enforce Any Law Which Shall Abridge The Privileges Or Immunities Of Citi-

zens Of The United States; Nor Shall Any State Deprive Any Person Of Life, Liberty, Or Property, Without Due Process Of Law; Nor Deny To Any Person Within Its Jurisdiction The Equal Protection Of The Laws."

The District Court, and the United States Court of Appeals for the Sixth Circuit, both denied the Defendant-Petitioner Patricia R. Smith, the right of a trial, either with, or without a jury, on the issues raised in the Complaint of the two Trust Companies, the joint administrators of the Estate of John A. O'Brien, filed on September 13, 1956, printed in Appendix B hereto, R. Vol. I, 16a-45a, all of which were denied and controverted in the Answer and Counterclaim which was filed by the Defendant-Petitioner Patricia R. Smith, on November 12, 1956, printed in Appendix B hereto, R. Vol. I, 121a-139a, and all of which conclusions of law and fact resulted in depriving the Defendant-Petitioner of her property, without due process of law, and all of which ruling and conclusions deny the Defendant-Petitioner the equal protection of the laws, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States. Such rulings of the District Court together with the rulings of the Circuit Court of Appeals, in its opinion, will result in a confiscation of the property of Patricia R. Smith, and a deprivation of two-thirds of the value, or values, of property to which she was entitled, and inherited from John A. O'Brien's Estate, to which she was the sole beneficiary under his last will, and of his entire Estate, as so held by the Court of Appeals of Kentucky, in a Rescission suit, which was filed against only the brothers of John A. O'Brien. The Petitioner now asserts that this is a denial insofar as she is concerned, of the equal protection of the laws of the United States, and a violation of the Fourteenth Amendment of the Constitution of the United States as set out above.

The Petitioner Patricia R. Smith, was denied the right under a "Motion (filed on February 23, 1957), For Leave To File An Amended Answer and An Amended Counterclaim," with the First Amended Answer and First Amended Counterclaim and Exhibits from "A" to "G," attached thereto, and tendered therewith, to Surcharge and Falsify the two Trust Companies' purported final settlements of the accounts of the estate of her husband John A. O'Brien, printed in Appendix B hereto, R. Vol. I, pp. 164a-330a, and the defendant-petitioner was denied the right under her Motion (filed on May 15, 1961), To File A Second Amended Answer And A Second Amended Counterclaim, with The Second Amended Answer and Second Amended Counterclaim and Exhibits from 42 through 75, attached thereto and tendered therewith (excepting Exhibit No. 51 which was inadvertently omitted), such ruling was in violation of Rule 15, of the Federal Rules of Civil Procedure, and the statutes and law of Kentucky, governing the final settlement of the accounts of an administrator, in Kentucky.

With these facts being pointed out, we ask a re-examination of the entire case, and the grounds on which the District Court granted the two Trust Companies' Motions For Summary Judgments, and awarded to the two Trust Companies the joint administrators of the Estate of John A. O'Brien, and their lawyers, over two hundred eighteen thousand four hundred seventy-two dollars and eighty cents ($218,472.80), for fees and interest, for representing the Estate of John A. O'Brien, (which the Trust Companies swore under oath in the inventory and appraisement which they filed, on May 31, 1934, in the Jefferson County Court, that it only had a market value of five hundred nine thousand two hundred ninety-five dollars and ninety-seven cents ($509,295.97) Exhibit No. 75, printed in Appendix C

hereto, R. Vol. II, pp. 1982a-1989a), without a trial on the issues involved in the joint administrators' purported final settlement of their accounts of the Estate of John A. O'Brien, together with the conclusions of law of the District Court and the Court of Appeals, as being in violation of the Fourteenth Amendment of the Constitution of the United States, and Rule 15, of the Federal Rules of Civil Procedure, and that this Court, in its final opinion upon this Petition for Writ of Certiorari, shall say whether or not the Kentucky Revised Statutes and laws of Kentucky, and the above provisions of the Constitution of the United States have or have not been violated by the rulings of the District Court, which was fully upheld by the United States Court of Appeals for the Sixth Circuit, and whether or not Rule 15, of the Federal Rules of Civil Procedure has been violated.

The Federal question thus raised was specifically passed upon by the United States Court of Appeals for the Sixth Circuit adversely to the Petitioner Patricia R. Smith, in the opinion denying the Petitioner's Petition for Rehearing, printed in Appendix D hereto, R. Vol. III, pp. 2576a-2579a.

QUESTIONS PRESENTED FOR REVIEW

1. In deciding that a District Court can take jurisdiction of the final settlement of the accounts of an estate, in Kentucky, which is definitely a probate matter, in order to approve the final settlement of the accounts of an estate, by two Trust Companies, who are the joint administrators of an estate, and approve all their acts and deeds over a period of thirty years of handling the said estate, without a trial of the case, and grant the two Trust Companies' Motions For Summary Judgments, and award to the two

Trust Companies the joint administrators, and their attorneys, over two hundred eighteen thousand four hundred seventy-two dollars and eighty cents ($218,472.80) for fees and interest, but deny the sole beneficiary of the will of the decedent, and of the entire Estate, the right to have a trial on the issues involved in the action or to file an amended answer and an amended counterclaim with seven exhibits, to surcharge and falsify the purported final settlement of the accounts of the estate, filed by the two Trust Companies who are the joint administrators of the decedent's Estate, within five years after the purported final settlements of accounts of the Estate are approved by a judge, of a County Court in Kentucky, as provided for by Kentucky statutes and law, did the Court of Appeals decide an important question of Kentucky statutes, and Kentucky law, in a way in conflict with applicable Kentucky decisions?

2. In deciding that the Defendant Patricia R. Smith could not file a first amended answer and a first amended counterclaim, with seven exhibits, or a second amended answer and a second amended counterclaim with exhibits numbering forty-two (42) through seventy-five (75), as provided for by Rule 15, of the Federal Rules of Civil Procedure, did the Court of Appeals violate the Rules of the Federal Rules of Civil Procedure?

3. In an action brought by Kentucky citizens in a Circuit Court, and removed to a Federal District Court, in Kentucky, because of diversity of citizenship, by two Trust Companies who are the joint administrators of an estate, which is the third settlement suit filed by the joint administrators in the Jefferson Circuit Court at Louisville, Kentucky, in the Estate of John A. O'Brien, affecting a partnership agreement, contracts, and property in Kentucky, involving the statutes and intricate questions of Kentucky

law, governing the duties of administrators in the administration of, and the final settlements of their accounts of an estate in Kentucky, has the Court of Appeals, by affirming the denial of the Motions of the Defendant-Petitioner for leave to file any amendments to her original Answer and Counterclaim, sanctioned a radical departure from accepted standards of judicial procedure?

4. In an action brought by two Trust Companies the joint administrators of an estate in Circuit Court in Kentucky, for the final settlement of their accounts of an estate, which is the third settlement suit filed and prosecuted in the said estate, by the joint administrators, and removed to the Federal Court in Kentucky because of diversity of citizenship, has the Court of Appeals, by affirming the denial of the right of the sole beneficiary of the will and the estate of the decedent, to have a trial on the issues involved in the action, sanctioned the violation of the Fourteenth Amendment to the Constitution of the United States, and denied the Defendant Patricia R. Smith of her property, without due process of law?

STATUTES INVOLVED, THE CONSTITUTION SECTION INVOLVED, AND RULES

This case is controlled principally by the Statutes of Kentucky, the decisional law of Kentucky, the Fourteenth Amendment to the Constitution of the United States, Section 1, and by Rule 19 of the Rules of the Supreme Court of the United States. The principal statutory provisions involved are annotations from the general Statutes of Kentucky from 1873 to the Kentucky Revised Statutes of today covering Kentucky County Courts, acting as Probate Courts, and the requirements for the final settlements of the accounts of administrators of Estates in Kentucky,

with some of the Kentucky law citations which apply thereto, taken from the Kentucky Revised Statutes, which are as follows:

ANNOTATIONS FROM THE GENERAL STATUTES OF KENTUCKY, FROM 1873 TO THE KENTUCKY REVISED STATUTES OF TODAY

The Statute Revision Committee of Kentucky prepared annotations on all the cases pertaining to the Statutes in Kentucky, naturally it covered our Statutes on County (Probate) Courts, more particularly with KRS 25.170 (1062; 1065) 1893, c. 221, Sections 42, 45.

Note: The origin of Section 1062 was G.S., Ch. 28, Art. XIV, Sections 1, 2. The origin of Section 1065 was G.S., Ch. 28, Art. XIV, Section 2.

The Court's attention is particularly called to the case of *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

ANNOTATIONS

Finality of settlement—A settlement is not conclusive, either upon the parties opposing it or the court, *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808; *Andrews* v. *McCarty,* 208 Ky. 25, 270 S.W. 466.

The confirmation of a settlement is a ministerial rather than judicial act. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A settlement is not a final adjudication in favor of one person or against another, or upon any question of prop-

erty or personal rights. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A formal entry of the order of confirmation of the settlement, in the absence of exceptions, is not a final judgment from which appeal can be taken. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A settlement is not conclusive, either on the parties or on the Court making it. It is not conclusive in any other court, but is only prima facie evidence, subject to be surcharged and falsified. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

Exceptions to settlement—When written exceptions to a settlement are regularly tried upon their merits by the county court, and that court enters a judgment, an appeal may be prosecuted according to K.S. 978 (23.030). *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A verbal objection at the time of settlement is not equivalent to the filing of formal written objections. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

Persons who do not file written exceptions or contest in the county court the validity of charges complained of may have the alleged errors reviewed by a bill in chancery. Scott's Heirs v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnees,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

KRS 25.190 (1066; 1067) 1893, c. 221, Sections 46, 47.

Note: The source of the two 1893 sections was G.S., Ch. 28, Art. XVI, Section 2.

ANNOTATIONS

A confirmation of a settlement is only prima facie evidence, and may be questioned on its merits by a bill in chancery. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

Kentucky Statutes Art. 5, Ch. 35; KS Sec. 1067; KS 3858, now KRS 25.175; KRS 25.200 (1067); KRS 28.200; KRS 62.060; KRS 62.070; KRS 287.220; KRS 395.255; KS 3859 now KRS 395.310; KRS 396.140; KRS 413.090; KRS 413.120; KRS 426.035; 44 ALR (2d) pp. 808, 809.

The Fourteenth Amendment of the Constitution of the United States provides:

> "No State Shall Make Or Enforce Any Law Which Shall Abridge The Privileges Or Immunities Of Citizens Of The United States; Nor Shall Any State Deprive Any Person Of Life, Liberty, Or Property, Without Due Process Of Law; Nor Deny To Any Person Within Its Jurisdiction The Equal Protection Of The Laws."

Rule 15 of the Federal Rules of Civil Procedure is set forth in the Appendix A hereto, at page —, also set forth in Appendix A hereto, are photo copies of the Statutes of Kentucky and law citations which apply to the within action, and governing the duties imposed upon administrators in the handling of Estates in Kentucky, and the Final Settlement of the Accounts of an administrator of an Estate in Kentucky.

STATEMENT OF THE CASE

This action was commenced on September 13, 1956, in the Jefferson Circuit Court, Chancery Branch, First Division, at Louisville, Kentucky, by the filing of the Complaint by the Plaintiffs Respondents, The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company (formerly the Fidelity & Columbia Trust Company) the Joint administrators, with the Will Annexed of the estate of John A. O'Brien, deceased. This action was removed to the United States District Court for the Western District of Kentucky at Louisville on October 2, 1956, on a Petition for Removal filed by the Defendant-Petitioner, Mrs. Patricia O'Brien-Smith, who is the widow of the decedent John A. O'Brien, who died on January 1, 1934. See Petition for Removal it is printed in Appendix B hereto, R. Vol. 1 pages 2a-12a, Printed Transcript of Record.

This action is the third settlement suit filed by the Plaintiff-Respondents the Joint administrators in the estate of John A. O'Brien, deceased, and against Mrs. Patricia R. O'Brien-Smith, in the Courts of Kentucky since 1937. The "Plaintiffs-Respondents Motion For Summary Judgments," was granted on November 9, 1962 by the District Court, (Judge W. Wallace Kent) without having a trial of the issues in this action.

Mrs. Patricia R. Smith, the Defendant-Petitioner in the within action, was formerly the wife of John Anthony O'Brien. Before their marriage she was Miss Ivy Patricia Rutherford. She met John A. O'Brien when she was a student at the Louisville Conservatory of Music, in Louisville, Kentucky, and he was a student at the Georgetown University in Washington, D. C. After four years of courtship, they were married on October 1, 1925, at Georgetown University, in Trinity Parish.

According to the Rite of the Roman Catholic Church, and in conformity with the laws of the District of Columbia, Reverend Vincent S. McDonough S.J., officiating, in the presence of a large number of guests including Charles Daley, Jr., and Dorothy Cassell, who were two of the witnesses, as appears from the marriage Register of the Holy Trinity Church, Georgetown, D. C. See Mrs. Smith's Exhibits No. 2, 2a and 2b, Appendix B hereto 495a-497a, Vol. No. 1, Printed Transcript of Record.

Patricia Rutherford and John A. O'Brien were married with the full consent and approval of both Mr. and Mrs. Edward J. O'Brien, Senior, the mother and father of John A. O'Brien, who were both present at their marriage, in Washington, D. C., as shown by the picture of Mr. and Mrs. John A. O'Brien, and Edward J. O'Brien, Senior, taken the next day after their marriage and filed in the within action on August 28, 1959. The said picture was made in Baltimore, Maryland, in the office of and by E. Lucas Girardville, French Regie Director in the United States. See Mrs. Smith's Exhibit No. 2c, Appendix B hereto, R. Vol. 1, pp. 498a-499a.

Two years and five weeks after the marriage of Patricia Rutherford and John A. O'Brien, on November 8, 1927, their first child was born, and at the request of Edward J. O'Brien, Senior, grandfather of the child, the child was christened Edwina Jane O'Brien. See Birth Certificate, Mrs. Smith's Exhibit No. 3, Appendix B hereto, R. Vol. 1 page 502a.

John A. O'Brien was a tobacco broker and was actively engaged in his business up until about seven months before his death. For nearly ten years John was in charge of all the tobacco buyers of Edward J. O'Brien & Company. His picture taken on Easter Sunday 1933, eight months before his death, in front of his home at 1045 Alta Vista

Road, in Cherokee Park, at Louisville, Kentucky, will be found on page 501a, Mrs. Smith's Exhibit No. 2d, Appendix B. R. Vol. 1.

John A. O'Brien died on January 1, 1934. The cause of his death was Enteritis and Tuberculosis, as stated by his two physicians who attended him twice daily before his death, Doctor Samuel A. Overstreet from August 1933, until the time of his death on January 1, 1934, and Doctor Heman Humphrey visited him twice daily with Doctor Overstreet, from October 20, 1933, until the time he died on January 1, 1394. See affidavit of Doctor Heman Humphrey, Mrs. Smith's Exhibit No. 12, R. Vol. 1, pages 630a, 631a, and 631¼a.

1. **The Last Will of John A. O'Brien dated September 22, 1933, Bequeathed All of His Property, Including His Partnership Interest In The Edward J. O'Brien Tobacco Company and its Four Subsidiaries To His Widow, Mrs. Patricia R. O'Brien (now Smith) As Held By The Opinion Of The Court Of Appeals Of Kentucky.**

On September 22, 1933, John A. O'Brien made his last will which was probated on March 1, 1934, in the Jefferson County Court at Louisville, Kentucky, the said will is as follows:

> "I give to my wife, Patricia R. O'Brien, all of the household furniture and all of the personal property of my estate."
>
> (signed) JOHN A. O'BRIEN
> September 22, 1933"
>
> "Witnessed by acknowledgment:
> (signed) DR. HEMAN HUMPHREY
> (signed) L. R. CURTIS"

The two witnesses on John A. O'Brien's last will who were Dr. Heman Humphrey, the family physician, and

L. R. Curtis, who was a Louisville lawyer then, and who is now one of the most prominent Judges of Louisville, Kentucky, stated, without reservation, that John A. O'Brien was fully competent to make a will at the time he acknowledged his last will in their presence, and both Dr. Humphrey and Dr. Overstreet stated that John A. O'Brien was fully able to transact any business up to the day before he died on January 1, 1934. See Mrs. O'Brien-Smith's Exhibit "B", R. Vol. 1, pp. 228a-232a.

By his last will, dated September 22, 1933, John A. O'Brien devised and bequeathed all of the personal property of his estate, including his twenty eight and one third (28-1/3%) per cent interest which he owned at the time of his death in the Edward J. O'Brien Tobacco Company, and its four subsidiaries, the Tobacco Rehandling Company Ltd., Inc., H. N. Martin Leaf Tobacco Company, Standard Storage Company and Western Tobacco Company, to his widow Patricia R. O'Brien (now Smith), who was the sole beneficiary of his last will, and the sole beneficiary of his entire estate, and that her partnership interest in Edward J. O'Brien & Company was personal property of John A. O'Brien's estate, WAS SO HELD BY THE OPINION OF THE COURT OF APPEALS OF KENTUCKY, IN THE FIRST OPINION RENDERED IN THE "RESCISSION SUIT" which was against the O'Brien brothers only. See Mrs. O'Brien's Exhibit 52, R. Vol. 2, page 1896a.

2. The Law Firm of Bruce and Bullitt (now the Law Firm of Bullitt, Dawson and Tarrant), Represented Mrs. O'Brien-Smith, from January 1934, to February 11, 1936, and Five Other Clients whose interests were in Conflict With The Interests of Mrs. O'Brien-Smith, Thus Receiving Five Separate Law Fees.

After the death of John A. O'Brien, Mrs. Patricia O'Brien (now Smith), employed William Marshall Bullitt,

of the law firm of Bruce and Bullitt, now the law firm of Bullitt, Dawson and Tarrant, to represent her in the final settlement of the estate of her deceased husband John A. O'Brien, and to collect the Life Insurance left by him that was made payable to her, in the sum of two hundred one thousand ($201,000.00) dollars. Bullitt agreed to represent her in the final settlement of the said estate, and to collect the Life Insurance, but he only represented her until February 11, 1936. When Mrs. O'Brien-Smith employed William Marshall Bullitt, he did not disclose to her that he was representing five (5) clients who had conflicting interests with her interests, namely:

(1) that he and his law firm had represented the brothers of John A. O'Brien and the Edward J. O'Brien Tobacco Company for years, and that the Edward J. O'Brien Tobacco Company were borrowers of large sums of money each year from his bank The Citizens Fidelity Bank and Trust Company,

(2) that he and his law firm was representing the Equitable Life Assurance Society of the United States,

(3) that he and his law firm was representing the Massachusetts Mutual Life Insurance Company,

(4) that he and his law firm was representing the Minnesota Mutual Life Insurance Company,

(5) that he and his law firm was representing The Fidelity and Columbia Trust Company (now Citizens Fidelity Bank & Trust Company),

(6) that he and his family owned over fifty one (51%) per cent of the entire Fidelity & Columbia Trust Company, which is now the Citizens Fidelity Bank and Trust Company,

which is one of the Plaintiffs-Appellees in the within action, making a total of six (6) conflicts of interest with the interests of Mrs. O'Brien-Smith, and five (5) separate law fees for William Marshall Bullitt, and his law firm of Bruce &

Bullitt, which is now the law firm of Bullitt, Dawson & Tarrant, who now represent The Louisville Trust Company and the Citizens Fidelity Bank and Trust Company the Joint Administrators of the Estate of John A. O'Brien, deceased, the Plaintiffs-Appellees in the within case, against Mrs. Patricia R. O'Brien-Smith, and they have kept the estate of John A. O'Brien, deceased, in constant litigation since 1937, for the Joint Administrators, and filed and caused to be filed, every kind of a law suit ever known to man to keep from filing a final settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court at Louisville, Kentucky, as the Court of Appeals of Kentucky four times ordered them to do.

J. G. McPherson, Vice-President of the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, on behalf of the two Trust Companies the Joint Administrators of the estate of John A. O'Brien, deceased, paid William Marshall Bullitt, and his law firm of Bruce and Bullitt, now Bullitt, Dawson and Tarrant, twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33), at eleven o'clock at night on February 11, 1936, from the money in the said estate. After Bullitt was paid, he refused to represent Mrs. O'Brien-Smith. The said amount of attorneys fees was not paid on Mrs. O'Brien's order, but over her protest. The paper signed by Mrs. O'Brien-Smith on February 11, 1936 at twelve o'clock at night approving the payments, was signed by her because J. G. McPherson, Vice-President of Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, told her if she did not sign the paper approving the payments of the lawyers fees, that she would not get a cent of the money that they had received for her partnership interest which the Joint Administrators had sold, and for which they received the payment. See Defendant-Appellant Mrs. O'Brien-Smith's

Exhibits No. 66 and 67, pages 1951a and 1952a, Volume 2, Printed Transcript of Record. On page 24, of the Joint Administrators' complaint, which is now page 41a, Volume 1, of the Printed Transcript of Record, they admit that the Joint Administrators paid the law firm of Bruce and Bullitt, twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33). On page 4 of the complaint, which is now page 19a, Volume 1, of the Printed Transcript of Record, they contradict themselves and state that the said amount was paid to Leo T. Wolford, just one of the lawyers in the law firm of Bruce and Bullitt. See complaint R. Vol. 1, pp. 41a and 19a.

Further in the Joint Administrators' Exhibit No. 1 to their complaint page 82a, Volume 1, Printed Transcript of Record, they state that the twenty three thousand three hundred thirty three dollars and thirty three cents ($23,-333.33) attorneys' fees were paid to Bruce and Bullitt for the services performed by the attorneys on behalf of Patricia R. Smith, but they contradicted themselves and under oath swore to an affidavit filed with the State Tax Commissioner of Kentucky, that the above amount of attorneys' fees was for representing the Joint Administrators of the O'Brien estate. See Mrs. O'Brien-Smith's Exhibit No. 17, R. Vol. 1, pp. 635a-636a.

The Joint Administrators further swore under oath, to the Commissioner of Internal Revenue, Treasury Department, Washington, D. C., that they had paid the above amount of attorneys' fees for a final settlement of the estate of John A. O'Brien. See Mrs. O'Brien-Smith's Exhibits No. 18 and 19, R. Vol. 1, pp. 637a-642a.

It is clear to be seen that the Joint Administrators so called final settlement of the Estate of John A. O'Brien, which was filed as their Exhibit No. 1, to their complaint, is replete with factual inaccuracies and distortions, and no

reliance or dependence can be put on anything they have stated therein.

From January 1934, to February 13, 1936, no law suits had ever been filed in the said estate, nor had William Marshall Bullitt or the law firm of Bruce and Bullitt, or any member thereof, ever prepared or signed any pleadings or papers of any kind or description, on behalf of Patricia O'Brien-Smith, or the Estate of John A. O'Brien, deceased.

After William Marshall Bullitt, and his law firm of Bruce and Bullitt, were paid the above amount of attorneys' fees, they refused to represent Mrs. O'Brien-Smith, any further, or to require The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, the Joint Administrators, to file a final settlement of the O'Brien estate in the Jefferson County Court at Louisville, Kentucky.

The Joint Administrators were fourteen (14) years in default of their statutory duties, when they filed a partial settlement of the John A. O'Brien estate on June 21, 1950, in the Jefferson County Court, at Louisville, Kentucky. The final settlement of the Estate of John A. O'Brien was due to be filed on March 1, 1936, and to this day it has not been filed, and they have not stated any reasons why it was not filed other than continuous and incessant litigation.

William Marshall Bullitt, and his law firm of Bruce and Bullitt, after February 13, 1936, openly represented the Plaintiffs-Appellees, the Joint Administrators The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, against the interest of the John A. O'Brien estate, and Mrs. O'Brien-Smith, the sole beneficiary of the said estate, as was held by the Court of Appeals of Kentucky, in the Rescission Suit which was against the O'Brien brothers only. See Mrs. O'Brien-Smith's Exhibit No. 52, R. Vol. 2, page 1896a.

William Marshall Bullitt, changed the name of his law firm twice, after 1936, first to Bullitt, Middleton & Seelbach, then to Bullitt, Dawson and Tarrant. Each time he changed the name of his law firm, he wanted a separate law fee from the O'Brien estate, and he has been awarded two separate attorneys fees by the Summary Judgments of the District Court, of November 9, 1962, in the within action, twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33), and thirty five thousand dollars ($35,000.00) with six per cent (6%) interest on the thirty five thousand dollars ($35,000.00) from March 5, 1952 to November 9, 1962 which amounts to twenty one thousand dollars ($21,000.00) making a total of seventy nine thousand three hundred thirty three dollars and thirty three cents ($79,333.33), awarded to the Bullitt, Dawson and Tarrant law firm by the Summary Judgments of the District Court of November 9, 1962.

3. The Louisville Trust Company And The Citizens Fidelity Bank And Trust Company Executed Bonds In The Amount Of $100,000.00 Each, When They Were Appointed As Joint Administrators Of The Estate of John A. O'Brien, And Agreed To Act As Such For One And One Half (1½) Per Cent Of The Total Assets Of The Estate.

At the suggestion and insistence of William Marshall Bullitt, who was representing Mrs. O'Brien-Smith at the time, she requested that the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, be appointed as one of the Joint Administrators of the estate of John A. O'Brien, and she made the request and they were appointed with The Louisville Trust Company as Joint Administrators of the estate of John A. O'Brien, deceased, on March 1, 1934, and executed Bonds in the amount of one hundred thousand ($100,000.00) dollars each. When they qualified as Joint Administrators of the

said estate, they both agreed to "faithfully perform and discharge all the duties of the aforesaid trust; in default of which we (The Trust Companys) will pay all the damages that may be sustained." See Mrs. Smith's Exhibits No. 20 and 21, R. Vol. 1 pp. 643a-652a.

At the time of his death, John A. O'Brien was one of the four owners of the Edward J. O'Brien Tobacco Company and its four subsidiaries, and Mrs. O'Brien-Smith inherited his entire interest in the said Company and its four subsidiaries as so held by the Court of Appeals of Kentucky, in its Opinion in the Rescission Suit, Mrs. Smith's Exhibit No. 52, R. Vol. 2, page 1896a.

4. The tobacco business known as Edward J. O'Brien & Company of Louisville, Kentucky, was originally established by Edward J. O'Brien, Senior, in 1880. It steadily grew in volume, extent of operations and profit, until it became one of the largest, if not the largest, independent tobacco brokers and dealers in the world. In 1915, Edward J. O'Brien, Senior, turned over all of the assets, including good will, of the business to a copartnership and took his eldest son, Edwin J. O'Brien, sometimes referred to as Edwin J. O'Brien, Jr., into the partnership. In 1919 the partnership admitted additional members, including Elizabeth Graves O'Brien, wife of Edward J. O'Brien, Senior, and James G. O'Brien, Joseph B. O'Brien, and John A. O'Brien, sons of Edward J. O'Brien, Senior, and Marie O'Brien Michael his daughter. Their respective interests at that time were as follows:

Mrs. Elizabeth Graves O'Brien	15%
James G. O'Brien	12%
Joseph B. O'Brien	12%
John A. O'Brien	12%
Marie O'Brien Michael	12%
Edward J. O'Brien, Sr.	25%

The partnership continued without interruption in the lucrative business of redrying and rehandling and dealing in tobacco, with its principal place of business in Louisville and branches in other States and foreign countries. In 1928, Edward J. O'Brien, Senior, died, leaving by will all of his 25% interest in the partnership to his five children, Edwin J. O'Brien, Jr., Joseph B. O'Brien, James G. O'Brien, John A. O'Brien and Marie O'Brien Michael. Thereupon, on May 29, 1928, all the surviving partners entered into Articles of Copartnership and continued the business without interruption. Later, in December, 1928, Marie O'Brien Michael withdrew from the partnership, leaving the mother and the four sons remaining. On January 23, 1931, Amended Articles of Copartnership (see Defendant-Appellant Mrs. Smith's Exhibit No. 25, pages 663a-669a, Volume 1, Printed Transcript of Record), were executed, whereby the business was continued by the mother, Elizabeth Graves O'Brien, and the four sons, Edwin J. O'Brien, Junior, James G. O'Brien, Joseph B. O'Brien, and John A. O'Brien, with each owning the following interest in the entire company, including the subsidiaries:

Elizabeth Graves O'Brien	15.00%
Edwin J. O'Brien, Jr.	21.25%
James G. O'Brien	21.25%
Joseph B. O'Brien	21.25%
John A. O'Brien	21.25%

5. The partnership agreement of January 23, 1931, contains several pertinent provisions, among which are the following.

> Article 2. The said parties and the survivors of them will continue to remain under the firm name of E. J. O'Brien & Company, for the term of Fifty (50) years from this date, if they or any two of them shall so long live, subject nevertheless to determination as hereinafter provided.

Article 5. The death of any partner hereto shall not terminate the partnership.

Article 6. In the event of the death of any partner his or her interest shall remain in said partnership until Five (5) years after such occurs, and in the event the surviving partners, before the expiration of Five (5) years, elect to admit the representative of said estate to membership, then papers shall be drawn in accordance with this Agreement and the terms at that time agreed upon, but until the admission of such representative to the firm, the estate, or its representative, shall be silent partner only and shall not be entitled to participate in the management and the personal representative shall accept statements rendered by the partnership as final and conclusive. In the event the estate elects to withdraw from the partnership at the expiration of Five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the Company, or by appraisement, plus profits and interest if any.

Article 23. These Articles may be amended at any time by the parties hereto and in the event of the death of a partner or such partner becoming incompetent or insolvent, the remaining partners may make such amendments, and the partnership may be terminated at any time by unanimous consent of all parties entitled to participate in the partnership or may with such consent be changed from a partnership to a corporation.

From January 1, 1931, to November 30, 1935, Edwin J. O'Brien, Jr., withdrew the total amount of the capital of which he had in the Edward J. O'Brien and Company and its four (4) subsidiaries and overdrew in the sum of one hundred forty four thousand dollars ($144,000.00), and he did not account for, or pay any interest on his overdraft to the O'Brien Company or to the Estate of John A. O'Brien, deceased. The estates proportionate part of the interest on

the overdraft amounted to thirty six thousand four hundred eighty six dollars and ninety seven cents ($36,486.97).

6. So instead, of Mrs. O'Brien-Smith just owning twenty one and one-fourth per cent (21¼%) interest of the capital in the O'Brien Company and its four (4) subsidiaries, as stated to her by J. G. McPherson and George D. Caldwell, Vice-Presidents of the two Trust Companys, the Joint Administrators, she actually owned twenty eight and one-third per cent (28 1/3%) of all the capital in the O'Brien Company and its four (4) susidiaries.

Edward J. O'Brien & Company not only owned and operated tobacco warehouses, redrying and rehandling plants in Louisville, but also operated large redrying and rehandling plants and tobacco warehouses at Lexington, Kentucky; Clarksville, Tennessee; Springfield, Tennessee; Wilson, North Carolina; Louisville, Kentucky; and Shelbyville, Kentucky, as well as a warehouse and office at Baltimore, Maryland; and Liverpool, England. See Mrs. Smith's Exhibits No. 45, 46 and 46a, R. Vol. 2 pp. 1859a-1872a. Edward J. O'Brien & Company owned and operated certain wholly owned subsidiaries through which it did a large part of its tobacco business. These subsidiares were known as:

1. H. N. Martin Leaf Tobacco Co.
2. The Tobacco Rehandling Co., Ltd. Inc.
3. Western Tobacco Co.
4. Standard Storage Co.

In addition to its United States business, Edward J. O'Brien & Company had large foreign contracts with several foreign countries, including a contract with the Government of France which had been a large customer, and had produced a lucrative business for about forty years. The tobacco business of Edward J. O'Brien & Company had been a steady and stable business, not affected by the de-

pression or the death of the senior partner and founder of the business, Edward J. O'Brien, Senior, but continued at a substantial profit year in and year out.

John A. O'Brien was the youngest son. He was taken into the partnership in 1919 with a full 12% interst in the Company, and after learning the business under the apprenticeship of his father, became a tobacco buyer in 1922. As such he was engaged in buying tobacco for the firm's account at various places, including Georgia, North Carolina, South Carolina, Tennessee and Kentucky. For nearly ten years John was in charge of all buyers of Edward J. O'Brien & Company.

7. There Was No Endorsement Of An Insurance Trust Agreement, Changing The Beneficiary Of The Two Hundred One Thousand ($201,000.00) Dollars Of Life Insurance From Mrs. O'Brien To Any Of The O'Brien Family On Any Of The Life Insurance Policies Left By John A. O'Brien, Payable To His Widow Ivy Patricia R. O'Brien (now Smith).

John A. O'Brien had two hundred one thousand ($201,000.00) dollars in policies of life insurance which he had taken out in 1926, 1928 and 1932, and upon which the premiums had been paid in full out of his own funds, payable to his widow Ivy Patricia R. O'Brien. There was one Life Insurance policy for fifty thousand ($50,000.00) dollars in the Equitable Life Assurance Society, upon which his wife, Ivy Patricia R. O'Brien, was the sole beneficiary. See Mrs. Smith's Exhibit No. 5, R. Vol. 1, pp. 503a-515a. There were four Life Insurance policies, totaling fifty one thousand ($51,000.00) dollars in the Minnesota Mutual Life Insurance Company, upon which his wife, Patricia R. O'Brien, was likewise the sole beneficiary. See Defendant-Appellant Mrs. Smith's Exhibits No. 9, 10, 11 and 12, pages 565a-

631½a, Volume 1, Printed Transcript of Record. There were three Life Insurance policies totaling one hundred thousand (100,000.00) dollars in the Massachusetts Mutual Life Insurance Company, upon which his wife, Patricia R. O'Brien, was the sole beneficiary as to one policy for fifty thousand ($50,000.00) dollars and was the beneficiary for life with remainder to surviving children, with remainder to the survivors of John's mother, brothers and sister, as to the other two policies for fifteen thousand ($15,000.00) dollars and thirty five thousand ($35,000.00) dollars, respectively, totaling fifty thousand ($50,000.00) dollars. See Mrs. Smith's Exhibits No. 6, 7 and 8, R. Vol. 1, pp. 516a-565a.

Immediately after the death of John A. O'Brien, George D. Caldwell, Vice-President of the Louisville Trust Company, one of the Joint Administrators of the said estate, and one of the Plaintiffs-Appellees in the within action, wrote a letter to each of the three above-named Insurance Companies not to pay the insurance to Mrs. O'Brien-Smith, claiming that The Louisville Trust Company had a so-called Insurance Trust Agreement which gave all of the two hundred one thousand ($201,000.00) dollars of Life Insurance as set out herein, to the three brothers of John A. O'Brien, deceased.

Thereafter, Patricia O'Brien-Smith, never received anything on the policies with the Minnesota Mutual Life Insurance Company or Massachusetts Mutual Life Insurance Company, until more than two years later, viz., after February 11, 1936, the date that her partnership interest was sold by The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company the Joint Administrators of the O'Brien estate, purportedly to James G. O'Brien. To George D. Caldwell's letter claiming John's insurance under the so-called insurance trust agreement, the Massachusetts Mutual Life Insurance Company made immediate

reply on January 29, 1934. See Mrs. Smith's Exhibit No. 15, R. Vol. 1, pp. 634a-635a. The said letter is as follows:

"MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

SPRINGFIELD, MASSACHUSETTS

January 29, 1934

Wesley E. Monk
General Counsel

John F. Handy
Associate Counsel
The Louisville Trust Company,
Mr. George D. Caldwell, Vice-President,
Louisville, Ky.

Re: Policies Nos. 839641 - 841255 - 896601 —
John A. O'Brien

Dear Sir:

Your letter of January 25, 1934, addressed to our Louisville agency, has been referred to this department for attention.

In view of the demand made in your letter, we will withhold any further payments under these policies. However, at no time during the life of these policies was there ever any indication that the Louisville Trust Company was named as trustee nor was this Company put on notice thereof nor were the conditions and provisions set forth in the contracts ever complied with in so far as any change of beneficiary was concerned.

According to our records, this insurance is payable to Patricia R. O'Brien, widow of the decedent, under certain installment option settlements which were set up by the insured for her benefit, and we will, accordingly, await further developments.

We construe your letter as making a demand upon us for payment and unless this matter is adjusted

within a very short time it will be necessary for us to interplead the respective claimants to this fund.

Yours very truly,
(signed) JOHN F. HANDY,
Associate Counsel."

JFH-B

Likewise the Equitable Life Assurance Society replied by letter on February 2, 1934, to George D. Caldwell's letter of demand, (see Mrs. Smith's Exhibit No. 13, R. Vol. 1, page 632a.) said letter is as follows:

"THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

393 Seventh Ave. New York
Thomas I. Parkinson, President

February 2, 1934

Walter G. Schelker
Assistant Secretary
Louisville Trust Company,
Louisville, Kentucky

Attention: Mr. George D. Caldwell
Vice-President and Trust Officer
Re: Policy No. 8870,524—John A. O'Brien

Gentlemen:

Your letter of January 25 addressed to our representative in Louisville, Kentucky, has been referred to this office for attention.

We find that Ivy P. O'Brien, wife of John A. O'Brien, the insured under Policy No. 8870,524 was designated as the beneficiary to receive the amount due at the death of the insured and that the beneficiary was never changed. Accordingly, the face of the policy was paid to this beneficiary after the death of the insured, in accordance with the terms and conditions of the contract.

Yours very truly,
(signed) W. G. SCHELKER,
Assistant Secretary."

LDF:LMT

With the Minnesota Mutual Life Insurance Company's reply to George D. Caldwell's letter, they enclosed copies of the changes of beneficiary dated December 29, 1933, changing the beneficiary clause, WHEREBY JOHN A. O'BRIEN MADE PATRICIA R. O'BRIEN, (NOW SMITH) SOLE BENEFICIARY WITHOUT REMAINDER, OVER TO ANYONE AND MAKING SUCH CHANGE IRREVOCABLE. See Mrs. Smith's Exhibit No. 9, R. Vol. 1, pages 567a, 568a, 575a; Defendant's Exhibit No. 10, pages 578a, 579a, 591a; Defendant's Exhibit No. 11, pages 594a, 595a, 605a; and Defendant's Exhibit No. 12, pages 609a, 610a, 625a.

On the advice of their attorney William Marshall Bullitt, of the law firm of Bruce and Bullitt, (now Bullitt, Dawson and Tarrant law firm), two of the insurance companies as set forth herein, the Massachusetts Mutual Life Insurance Company who carried one hundred thousand ($100,000.00) dollars worth of Life Insurance payable to Mrs. O'Brien-Smith, and The Minnesota Mutual Life Insurance Company, who carried the fifty one thousand ($51,000.00) dollars Life Insurance payable to Mrs. O'Brien-Smith, refused to pay the Life Insurance to Mrs. O'Brien-Smith, until after Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company and its four (4) subsidiaries, was sold over her protest by the Joint Administrators, sometime in 1935, for three hundred eighty thousand ($380,000.00) dollars, purportedly to James G. O'Brien, one of the brothers of John A. O'Brien.

8. There Was Never Any Dispute Of Any Kind Or Description Between Patricia R. O'Brien (Smith) And The Members Of The Family Of John A. O'Brien, After His Death.

There was never any dispute of any kind or description between Patricia O'Brien-Smith and the members of

the family of John A. O'Brien, deceased, after his death. There was no dispute as to the validity of the testamentary instruments found after the death of John A. O'Brien; there was no dispute as to the value of his interest in the Edward J. O'Brien Company; there was no dispute as to the effectiveness of an insurance trust agreement; or any other matters. Patricia O'Brien Smith never spoke to any of the members of the family of John A. O'Brien, deceased, after the death of her husband. Mrs. O'Brien-Smith acted on the advice of J. G. McPherson, Vice-President of the Citizens Fidelity Bank & Trust Company, and her attorney, William Marshall Bullitt, who told her not to speak to, or talk to any member of the family of her husband John A. O'Brien. All that she knew of any contentions that any member of the O'Brien family might have made was through J. G. McPherson, and George D. Caldwell, the Vice-Presidents of the two Trust Company Joint Administrators, and William Marshall Bullitt, who owned the controlling interest in the Citizens Fidelity Bank & Trust Company.

9. The Sale Of Mrs. Patricia O'Brien-Smith's Partnership Interest In Edward J. O'Brien & Company And Its Four Subsidiaries By The Two Trust Companies' Joint Administrators In Violation Of The Terms Of The Partnership Agreement, And For Less Than One Third Of The Market Value.

One of the main issues in this action, raised by the complaint of the Plaintiffs-Appellees, and by their "Account and Final Settlement of The Execution of Their Trust," of the accounts of John A. O'Brien's estate, which is their so-called final settlement of the O'Brien estate, Plaintiffs-Appellees Exhibit No. 1, is the value of the interest owned, by Mrs. Patricia R. O'Brien (now Smith) in the family partnership of Edward J. O'Brien Tobacco Company and its four subsidiaries namely:

1. The Tobacco Rehandling Company, Ltd., Incorporated, whose main office is in London, England,
2. The H. N. Martin Leaf Tobacco Company,
3. The Standard Storage Company, and
4. The Western Tobacco Company,

whose main offices as heretofore stated are all located in Louisville, Kentucky, except one of the subsidiaries, The Tobacco Rehandling Company Limited Incorporated, and its main office and plant are in London, England. The O'Brien Company has offices and redrying plants in Lexington, Kentucky; Clarksville, Tennessee; Kinston, North Carolina; Wilson, North Carolina; Shelbyville, Kentucky; and Louisville, Kentucky, and are known to be the largest independent tobacco brokers in the world.

During the year of 1935, the Plaintiffs-Appellees, The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company (formerly Fidelity and Columbia Trust Company), the Joint Administrators of the Estate of John A. O'Brien, deceased, sold Mrs. Patricia O'Brien-Smith's partnership interest, in the Edward J. O'Brien & Company and its four subsidiaries, purportedly to James G. O'Brien, one of the brothers of John A. O'Brien, deceased, for three hundred eighty thousand ($380,000.00) dollars. Of this amount, the Trust Companies the Joint Administrators, retained one hundred thousand ($100,000.00) dollars. The Federal Estate Taxes had already been paid, before the Trust Companies retained the above amount.

The Plaintiffs-Appellees, the Joint Administrators of the estate of John A. O'Brien, deceased, sold Mrs. Patricia O'Brien-Smith's partnership interest, in two years after the death of her husband, John A. O'Brien, and required the partners in the O'Brien Company, to only pay one year's profits of the O'Brien Company and its four subsidiaries, to the Estate, in violation of the terms of the partnership agreement, and without an order or approval

of any Court, disregarding the partnership agreement between John A. O'Brien and the other partners of Edward J. O'Brien & Company, dated January 23, 1931, and its provisions as set forth therein. See Mrs. O'Brien-Smith's Exhibit No. 25. R. Vol. 1, pp. 663a-669a.

In 1935, the Joint Administrators of the estate of John A. O'Brien, deceased, started talking to Mrs. O'Brien-Smith, about selling her partnership interest which she inherited from her husband in Edward J. O'Brien & Company and its four subsidiaries; they gave her a piece of paper, consisting of fifteen lines, upon which to sell her interest. See Mrs. Smith's Exhibit No. 53, R. Vol. 2, page 1920a, which is as follows:

"DEFENDANT MRS. O'BRIEN-SMITH'S EXHIBIT No. 53

A Sheet Of Paper Given To Mrs. Patricia O'Brien-Smith, With Fifteen (15) Lines Of Figures Typed Thereon, And Starts With Present Interest In Edward J. O'Brien Tobacco Company (And Its Four Subsidiaries).

Present Interest		$425,649.45
Real Estate	$331,873.95	
Pro Rata based on capital	23.77%	78,886.44
		346,763.01
Her 1/3 Life Interest Real Estate— 23¼% of 78,886.44		18,341.10
		365,104.11
Depreciate wholly owned subsidiaries—50% 252,500 at 50%—126,250 at 23.77%		30,009.62
		$335,094.49
Remainder Interest in $50,000 Life Ins.		17,500.00
		$317,594.49
½		$158,797.25"

1. The Joint Administrators of John A. O'Brien's estate told Mrs. O'Brien-Smith, that the market value of the partnership interest owned by John A. O'Brien at the time of his death, in the Edward J. O'Brien & Company and its four subsidiaries, was $425,649.45 and after deductions which the O'Brien brothers could make, it ended up with the figure of One Hundred Fifty Eight Thousand Seven Hundred Ninety Seven Dollars and Seventy Five Cents ($158,797.75) and,

2. That the real estate, property, redrying plants, and equipment owned by the Edward J. O'Brien & Company, had a market value of Three Hundred Thirty One Thousand Eight Hundred Seventy Three Dollars and Ninety Five Cents ($331,873.95) and,

3. That the interest owned by John A. O'Brien, at the time of his death, in the real estate, property, plants and equipment in Edward J. O'Brien & Company and its four subsidiaries, was not personal property of John A. O'Brien's estate, and that there must be deducted therefrom, the total of the value of John A. O'Brien's interest in all the real estate, property, plants and equipment and that it amounted to Seventy Eight Thousand Eight Hundred Eighty Six Dollars and Forty Four Cents ($78,886.44), because John A. O'Brien's capital in Edward J. O'Brien & Company and its four subsidiaries, was twenty three and seventy seven one hundredths per cent (23.77%) of the whole, therefore, there must be deducted Seventy Eight Thousand Eight Hundred Eighty Six Dollars and Forty Four Cents ($78,886.44), from the market value of the real estate, leaving a balance of Three Hundred Forty Six Thousand Seven Hundred Sixty Three Dollars and One Cent ($346,763.01) and,

4. That Mrs. O'Brien-Smith, had only a widow's dower interest of one third (1/3) life interest in the real estate,

property, plant and equipment, owned by John A. O'Brien in the Edward J. O'Brien & Company, which she inherited, and that there should be deducted twenty three and one fourth (23¼%) per cent of the Seventy Eight Thousand Eight Hundred Eighty Six Dollars and Forty Four Cents ($78,886.44) in the amount of Eighteen Thousand Three Hundred Forty One Dollars and Ten Cents ($18,341.10), leaving the amount of Three Hundred Sixty Five Thousand One Hundred Four Dollars and Eleven Cents ($365,-104.11) and,

5. That the four (4) wholly owned subsidiaries of the Edward J. O'Brien Tobacco Company, should be depreciated fifty (50%) per cent. That the wholly owned subsidiaries were carried on the books of Edward J. O'Brien & Company at a book value of Two Hundred Fifty Two Thousand Five Hundred ($252,500.00) Dollars, but that the subsidiaries should be depreciated fifty (50%) per cent of the book value, to arrive at the market value, leaving a balance of One Hundred Twenty Six Thousand Two Hundred Fifty ($126,250.00) Dollars. That John A. O'Brien owned twenty three and seventy seven one hundredths (23.77%) per cent, of the subsidiaries, therefore, there should be deducted from the value of the subsidiaries for Mrs. O'Brien-Smith's part, Thirty Thousand Nine Dollars and Sixty Two Cents ($30,009.62), leaving a balance of Three Hundred Thirty Five Thousand Ninety Four Dollars and Forty Nine Cents ($335,094.49) and,

6. That the three brothers of John A. O'Brien, deceased, were entitled to a remainder interest in Fifty Thousand ($50,000.00) Dollars of two of the Life Insurance policies of the Massachusetts Mutual Life Insurance left by John A. O'Brien, payable to his widow, Mrs. Patricia O'Brien-Smith, so, for the three brothers of John A. O'Brien, the Joint Administrators deducted Seventeen

Thousand Five Hundred ($17,500.00) Dollars from Mrs. O'Brien-Smith's interest in the partnership, leaving a balance of Three Hundred Seventeen Thousand Five Hundred Ninety Four Dollars and Forty Nine Cents ($317,594.49) and,

7. The Joint Administrators then told Mrs. O'Brien-Smith, that she did not inherit any interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries, under the last will of John A. O'Brien, deceased, and that she would only get what the Kentucky law provided, in the event there is no will, stating that she would only get one half of the value of John A. O'Brien's partnership interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries, and they deducted one half thereof, leaving a balance of One Hundred Fifty Eight Thousand Seven Hundred Ninety Seven Dollars and Twenty Five Cents ($158,797.25), see Mrs. Smith's Exhibit No. 53, R. Vol. 2, page 1920a.

Patricia O'Brien-Smith told J. G. McPherson, and George D. Caldwell, the Trust Officers of the two Trust Companies, the Joint Administrators of John A. O'Brien's estate, and their attorney William Marshall Bullitt, that she did not want to sell her partnership interest in the Edward J. O'Brien & Company for any price, until the end of five (5) years which she was told was provided by the partnership agreement, Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 25, pages 663a-669a, Volume 1, Printed Transcript of Record. She told them that she did not want to mix the insurance matter with John A. O'Brien's estate, but was only interested in getting her insurance money.

8. The Joint Administrators told Mrs. O'Brien-Smith that the O'Brien brothers would not release their claims under a so-called Insurance Trust Agreement under which they were claiming the Two Hundred One Thousand

($201,000.00) Dollars of Life Insurance that was made payable to Patricia O'Brien-Smith, unless Patricia O'Brien-Smith would sell out her interest in the Edward J. O'Brien & Company.

9. The officers of the Trust Companies further told her that unless she sold her interest in the Edward J. O'Brien & Company at the figure set by the O'Brien brothers, that they would incorporate the company and freeze out her husband's interest so that it would not be worth One Hundred Thousand ($100,000.00) Dollars.

10. J. G. McPherson and George D. Caldwell told Mrs. O'Brien-Smith that John A. O'Brien's interest in the partnership of Edward J. O'Brien & Company would be as liable in the loss as Edwin J. O'Brien, Jr. would be in the law suit filed against him and the other Directors of the National Bank of Kentucky, filed in 1929.

11. J. G. McPherson and George D. Caldwell further said that neither John A. O'Brien's will of September 22, 1933, or the will of July 7, 1933, gave her any part of the interest in the partnership real estate, and that the last will of John A. O'Brien would be construed as meaning only "personal effects," such as cuff links, shaving brush and similar personal items.

12. J. G. McPherson and George D. Caldwell said that the O'Brien brothers were willing to pay her Three Hundred Fifty Thousand ($350,000.00) Dollars if she would sell the partnership interest right away. After this long conference, Patricia O'Brien-Smith replied that she still did not want to sell her husband's interest in Edward J. O'Brien & Company until the end of five years and she wanted to remain a partner for five years. She said she wanted to have an audit made and she was willing to pay for it. J. G. McPherson and George D. Caldwell both re-

plied that Edwin J. O'Brien, Jr, would not allow them to have an audit made of the O'Brien Company and that they could not force the O'Brien brothers to give her the right to have an audit made of the company.

13. J. G. McPherson and George D. Caldwell said the figures shown on the 1934 audit made by Peat, Marwick, Mitchell & Company, of the Edward J. O'Brien & Company showed the market value of the interest owned by John A. O'Brien, and that was the amount shown on the paper, Defendant-Appellant's Exhibit No. 53. Patricia O'Brien-Smith definitely told J. G. McPherson and George D. Caldwell that she would not sell the partnership interest at any figure.

At that time Patricia O'Brien (now Smith) did not know what a "subsidiary" was, but thought it meant "stocks like Liggett & Myers and Reynolds Tobacco Company, and they wanted to cut them in half because they had gone down." She had never seen an audit, had never done any bookkeeping, typewriting or stenographic work. She did not know what a balance sheet was, nor what a recapitulation of assets and liabilities meant. She did not know what an appraisal was. She did not know the meaning of "good-will" or that it had any connection with business or partnership values. In short, Patricia O'Brien-Smith had no schooling in or knowledge of business matters whatsoever.

After the morning conference with the officers of the Trust Companies, Patricia O'Brien-Smith returned home shortly after noon. She told some of the members of her family that she was being forced to sell her interest in Edward J. O'Brien & Company, and knew nothing about such matters, and asked them what to do. It was suggested that she secure the services of a local auditor, and she called Ernst and Ernst, accountants, on the telephone and

asked them to send an auditor out to her home. Edward C. Wirotzious, one of their employees, came out, and she showed him the 1933, and 1934 audits of Edward J. O'Brien & Company, which had been turned over to her by the officers of the two Trust Companies, the Joint Administrators, and they said they took these two audit reports from the file in their banks. See Mrs. O'Brien-Smith's Exhibit No. 42, R. Vol. 2, pp. 1758a-1807a. Edward Wirotzious spent about two hours looking them over during the afternoon.

When Patricia O'Brien-Smith took Edward C. Wirotzious to the first conference with the Joint Administrators, when they were trying to get her to sell her partnership interest, she introduced Edward C. Wirotzious and told them she had brought him to the conference with her to get permission to have the books of Edward J. O'Brien Tobacco Company audited. They told her that Edwin J. O'Brien, Jr. would never permit an audit to be made of the O'Brien Company. Edward C. Wirotzious attended several conferences with Mrs. O'Brien-Smith, when J. G. McPherson and George D. Caldwell were both present in one of their offices. Edward C. Wirotzious stated to them that he made no attempt whatsoever to ascertain the correct or market value of the partnership interest of John A. O'Brien, deceased, for Patricia O'Brien-Smith, as he was never employed for that purpose. The only reason that he was present at any of the conferences was to obtain permission for the Ernst & Ernst accounting firm to make an audit of Edward J. O'Brien & Company for Patricia O'Brien-Smith. It was explained to both J. G. McPherson and George D. Caldwell that Edward Wirotzious was present only for the purpose of convincing them of the importance of having an audit made and of obtaining their permission to make such an audit of the O'Brien Company. It

was never stated at any time that he was present for the purpose of analyzing any audits or to determine the true market value of the partnership interest which was owned by Patricia O'Brien-Smith. Further, Edward Wirotzious never gave Patricia O'Brien-Smith any advice except to say he could not tell what the value of her husband's interest was in Edward J. O'Brien & Company unless he made an independent audit. Mrs. O'Brien-Smith is fully corroborated in all her statements made in regard to what took place at the conferences and in regards to the negotiations for the sale of her partnership interest by the deposition of Edward C. Wirotzious, consisting of fifty two typewritten pages, each page of which is signed by him and filed in the within action on August 28, 1959, by order of the District Court, with the "Defendant Patricia O'Brien-Smith's Supplemental Affidavit In Opposition to 'Plaintiff's Joint Administrators' Motion for Summary Judgment" and "Second Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim, Filed Herein on November 12, 1956," see Defendant-Petitioner Mrs. O'Brien-Smith's Exhibit No. 35, R. Vol. 1, pp. 1230a-1277a.

There was not any testimony of any kind or description taken or filed in the within action, and there was only one deposition filed in the within action and that was the deposition of Edward C. Wirotzious.

When the deposition of Edward C. Wirotzious was taken by Judge A. D. Kirk, an attorney, on behalf of Patricia O'Brien-Smith, Edward C. Wirotzious was then employed by the United States Treasury Department, Bureau of Internal Revenue, and had been employed by them about a year and a half. Prior to that he had been a senior accountant on the staff of Ernst & Ernst, Public Accountants and Auditors of the Louisville Office, Louisville, Kentucky.

The deposition of Edward C. Wirotzious completely refutes all statements contained on pages 8, 9, 10, 11, 12 and 13, under Paragraphs VII, VIII and IX, of the Joint Administrators' so-called Final Settlement of the Estate of John A. O'Brien (filed as their Exhibit No. 1 to their complaint on September 13, 1956, and shown on pages 61a-67a, Volume 1, Printed Transcript of Record), in regards to the negotiations that the Joint Administrators claimed that Mrs. O'Brien-Smith had with the surviving partners and the O'Brien family.

When Edward C. Wirotzious was questioned by Judge A. D. Kirk, an attorney who was taking his deposition of why he was present at the conferences with Mrs. O'Brien (Smith), J. G. McPherson and George D. Caldwell, before her partnership interest was sold by the Joint Administrators, Edward C. Wirotzious stated in answer to question 22, (pages 1237a, 1238a, Volume 1, Printed Transcript of Record):

> "Q22—If I understand you correctly,—you can say whether or not I am right,—your presence there was that you assumed you would be called on . . . to make an audit of Edward J. O'Brien & Company as an employee of Ernst & Ernst?
>
> A—You are right Judge on that, but my interest all along has been to obtain from the representatives of the O'Brien interest the authority or permission,—I should say instead of authority, permission to make an audit of the O'Brien Company books and records and the books and records of the subsidiary companies for Mrs. O'Brien. In fact, I have never given her any advice whatsoever as to what her interest was or what the value of her interest would be, and I told her then and I am repeating what I said earlier in this deposition, that the only way I could prove or disprove Mr. Richardson's figures would be to make an investigation on my own behalf."

Patricia O'Brien-Smith did not see the 1935 appraisal report of the property, plant and equipment of Edward J. O'Brien & Company or its subsidiaries, nor was such an appraisal report or any appraisal report, present at any of the numerous meetings and conferences.

Likewise, neither Patricia O'Brien-Smith, nor anyone representing her were ever shown or given access to the audit reports for the four subsidiary companies. *George D. Caldwell stated under oath that he never saw any audit reports of any of the subsidiaries at any time nor did he try to get any, and further stated that he never saw any appraisal reports at any time;* and *this was also the statement of J. G. McPherson.* It was not possible from the 1933 and 1934 audit reports of the Edward J. O'Brien Tobacco Company, to determine the proper valuation of the tobacco inventory for the reports valued the inventories "at cost generally which is lower than market with due regard to the various grades," or the market value of the interest owned by Mrs. O'Brien-Smith.

When Edward C. Wirotzious was questioned about what audit reports were shown him he stated that he was shown some audit reports of Edward J. O'Brien & Company but no audit reports of the four subsidiaries was ever shown to him or Mrs. O'Brien-Smith. When asked if he saw any audits for the four subsidiaries, or any appraisals of the property, plant and equipment of Edward J. O'Brien & Company or for the four wholly owned subsidiaries, he replied (pages 1257a, 1258a and 1260a, 1261a, 1262a, Volume 1, of the Printed Transcript of Record):

> "xQ103—And you say at the meeting that night, as you fixed it in early July, you discussed with Mr. Richardson the value of the wholly owned subsidiaries of the Edward J. O'Brien Tobacco Company?
>
> A—That is right.

xQ104—Did you have anything present that night other than the 1933 and 1934 audits of the Edward J. O'Brien Tobacco Company?

A—That was all we brought. Mr. Richardson had some papers with him.

xQ105—Didn't he have with him the audits of the H. N. Martin Leaf Tobacco Company and Tobacco Rehandling Company for 1933 and 1934?

A—No, he didn't.

xQ117—Any appraisals there?

A—No, sir.

xQ125—And you didn't advise Mrs. O'Brien to do it?

A—I didn't give her any advice at all.

xQ126—You were there simply to get a job for Ernst & Ernst to audit the books?

A—That is exactly it.

xQ129—Did you advise Mrs. O'Brien at that time or tell her that the audits did not contain any valuation for good will?

A—It was not discussed. We didn't discuss values at all at that particular time or at any time. As I have stated before in this deposition, I have never advised Mrs. O'Brien as to what,—that is, prior to the time she sold out in November, 1935, what her interest would be, whether it could be increased $150,000.00 or be reduced down to $50,000.00. I never did talk to her about it because I was not in a position to make a statement relative to it."

During July, 1935, there were frequent conferences with her attorney and the Joint Administrators but Patricia O'Brien-Smith. said at the conclusion of the conferences and before she left town for the summer that she did not

want to sell her interest in Edward J. O'Brien & Company at any price for five years and asked the lawyers to push the insurance matter for her.

Patricia O'Brien Smith, had no contact with the matter until the latter part of September, when, after her return to Louisville, a conference was arranged for a couple of days later, about the first of October, at which J. G. McPherson and George D. Caldwell E. C. Wirotzious, F. A. Shonkwiler, Mrs. L. S. Blickenstaff and Patricia O'Brien-Smith were present. J. G. McPherson and George D. Caldwell said the O'Brien brothers had increased their offer to $380,000.00 for the partnership interest if she would sell. Patricia O'Brien-Smith asked what the profits would be for 1935, and J. G. McPherson and George D. Caldwell said there would not be any profits; that the Company had operated at a loss. She asked for an audit for 1935, but they said that an audit had not been made but when it was it would show that the Company had a loss for the year. Patricia O'Brien-Smith told them that she insisted that an audit be made to determine what the interest was worth; that she wanted to hold the partnership interest until the end of five years, as provided in the partnership agreement, and that she did not want to mix the insurance John had left her with the estate matters. J. G. McPherson and George D. Caldwell refused to permit an audit to be made and said the O'Brien brothers would not release their claims to her insurance unless she would sell the partnership interest in Edward J. O'Brien & Company at the figure offered by them. They said that unless she sold immediately, the O'Briens would sue on the insurance trust agreement and were going to incorporate the business and freeze her out. They again repeated the threat with reference to construing the will and with reference to the bank liability. Edward C. Wirotzious corroborated Patricia

O'Brien-Smith's recital of J. G. McPherson and George D. Caldwell's threats, and what occurred at this conference. See the deposition of Edward C. Wirotzious Mrs. O'Brien-Smith's Exhibit No. 35, pages 1230a-1277a, Volume 1. On page 24 of his deposition (which are pages 1251a-1256a, Volume 1, Printed Transcript of Record), he stated:

> "Q70—Now, I am talking about what she (Mrs. O'Brien-Smith) was talking about at the meeting to Mr. Barker and others?
>
> A—She asked that she be permitted to have the books of the E. J. O'Brien Tobacco Company audited from the date of Mr. Edward O'Brien, Sr.'s death in 1928 up to the date of the proposed sale, which would have taken us up to November 5th or November 15th, which is right close to the date, as reflected in the 1935 audit report, of the sale of her partnership interest.
>
> Q71—Was anything said about the cost of that audit, or how it should be borne?
>
> A—Mrs. O'Brien told all those who were present, and I recall definitely that there were present in addition to Mrs. O'Brien, myself and L. R. Curtis, an attorney, there were Mr. McPherson, with the Fidelity & Columbia Trust Company, Mr. George Caldwell, of the Louisville Trust Company, Mr. Leo Wolford, of Bruce & Bullitt. Mr. Barker was there and Mr. Humphrey. We were in Mr. Humphrey's office in the Kentucky Home Life Building and that was the meeting at which an attempt was made to have Mrs. O'Brien sell out her interest in the E. J. O'Brien & Company. She said 'I want an audit made,—I am willing to pay for it.' And further, it was always my understanding that she wanted to pay for the audit because on the occasions that I talked with her, my firm rendered a bill to her and she paid it out of her personal funds.
>
> BY MR. SEELBACH: What date was that meeting?
>
> A—That meeting that the Judge was talking about that was held just prior to the date that Mrs. O'Brien

sold out, — sometime around the first part of November or the last part of October, I don't remember the exact date."

On page 25 of Edward C. Wirotzious' deposition he stated:

"Q72—Did she also ask for an appraisal of the property?

A—Yes, sir. She asked that the property be appraised; that she be permitted to have the properties appraised, I should say.

Q73—And audited?

A—And an audit of the books made.

Q74—Now, what was said to her from the Edward J. O'Brien & Company side on that subject as to whether they would permit it or not?

A—At that time, as well as the first meeting that we had in July, the night of the first time that I met Mrs. O'Brien, Mrs. O'Brien made the statement that she wanted to have the books audited and was willing to pay the cost thereof. Mr. Barker said that he wouldn't agree to have such done. It was at the first meeting in July we also asked to see certain contracts we felt were in existance between the tobacco interests and foreign customers and these also were refused to us. Mrs. O'Brien was refused permission to examine the official records of the company, at least every time that I was present with her when she made the request. My only interest all along in being present at these various conferences that we speak about was to get authority to make the audit of the Edward J. O'Brien Tobacco Company and its wholly owned subsidiaries."

On page 27 of Edward C. Wirotzious' deposition he further stated:

"Q82—I want to ask you if you observed and if Mr. Barker was in position to observe, as you were, Mrs.

O'Brien's own reactions to the coercion that was put upon her to sell this property at these conferences that you attended?

A—Judge Kirk, I was amazed at the time that this conference was going on at the treatment that Mrs. O'Brien was receiving at the hands of all present there excepting Mr. Curtis and myself, who had nothing to say by virtue of the fact that we were merely along as witnesses. Let me explain it like this: When you were a boy and your parents stood over you with a stick to whip you into doing something, you did it, not because you wanted to, but because you were forced into it.

Q83—Well, does that illustrate her (Mrs. O'Brien-Smith's) reaction at this conference?

A—She was taking an awful whipping over there that day. I really felt sorry for her, but there wasn't anything I could do. Mrs. O'Brien sat over there on one side of the room and she said a dozen times or more, 'I don't want to sell my interest. Why should I take my money out of that Company where I am getting a good return to get something that is not as good? I want to stay in.' "

On page 28 of Edward C. Wirotzious' deposition he further stated:

"Q84—Was that true also in July?

A—In July she made the statement she didn't want to sell out. She told me on a couple of occasions she did not want to sell out and she told me the first time I was there that she didn't want to sell out.

Q85—I didn't want to ask what she told you personally. I only want to ask what about at these conferences. Are you now undertaking to confine your answer to what occurred at the conferences?

A—At the conferences. There was the same general threat at that time of incorporating the company, freezing out her interest, and they told her at that time

she wouldn't get more than $100,000.00 for her interest. There was the same threat made at that particular meeting where it was stated that they would sue on the insurance trust agreement and would win under it unless she would sell out her interest. She said 'How do I know you have the insurance releases if I sign this paper?' Mr. George Caldwell said 'I have them right here in this pocket.' Mrs. O'Brien said, 'Can I see them?' and at that time Mr. George Caldwell said, 'I will show them to your attorney, but I will not show them to you.' Those things were very definitely imprinted in my mind because of the treatment accorded a woman by a group of men whom I thought were gentlemen. I had never seen anything like that. It makes my blood boil every time I think of it."

On page 29 of Edward C. Wirotzious' deposition he further stated:

"xQ90—Now, you say all those present were, as you put it, 'brow-beating her' into selling her interest?

A—Yes, sir, that included everybody present except me and Mr. Curtis.

xQ91—And the others that were present at the meeting you speak of were Mr. Barker and Mr. Edward P. Humphrey and Mr. Leo Wolford and Mr. McPherson and Mr. George Caldwell, and all of them were treating her the same way?

A—Yes, sir, all seemed to be talking to her at one time.

xQ92—And that was the meeting Mr. Caldwell told you he had the insurance releases in his pocket?

A—Yes, sir; he said 'right here in my pocket.' I didn't get to see them."

After the conference, Patricia O'Brien-Smith was shaken somewhat by the statements that J. G. McPherson and George D. Caldwell had made, particularly with reference

to incorporating the business and freezing her out. She told them that she was against selling her interest, but under the circumstances would have to sell.

A letter of acceptance was dictated at this conference, and Mrs. O'Brien-Smith, was instructed to go home and copy the letter in her own hand writing and mail it to her attorneys, which she did do. However, after she sent the letter of acceptance to her lawyers, she was still opposed to selling her interest, and cancelled it by telling them on the telephone that she would not sell under any circumstances. Because of her continued opposition all through October to selling the partnership interest, another conference was called toward the end of October or the first of November, 1935.

At all the conferences, Patricia O'Brien-Smith, had constantly repeated that she did not want to sell the partnership interest; that she wanted to remain in the partnership for five years allowed to her by the partnership agreement, and she did no want to mix the insurance with the estate because she was entitled to the insurance separate from the estate. She kept insisting upon an independent audit. She was assured by J. G. McPherson of Fidelity and Columbia Trust Company, and George D. Caldwell, the Joint Administrators of the estate of John A. O'Brien, that she could rely on the figures in the Peat, Marwick, Mitchell & Company audit of 1934, and that if she should ever find that John's interest was worth a dollar more than was shown in that audit, she could always recover it.

She pondered J. G. McPherson and George D. Caldwell's statements about the O'Brien claim under the so-called insurance trust agreement; about having the will of September 22, 1933, construed to mean only such personal effects as cuff links, jewelry and similar personal items;

about her interest being worth only $158,797.25 (Defendant-Appellant's Exhibit No. 53), and especially their statement that the O'Briens would incorporate the business and freeze her out. Mrs. O'Brien's statements were corroborated by Edward C. Wirotzious and F. A. Shonkwiler. See the deposition of Edward C. Wirotzious filed in the within action on August 28, 1959, Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 35, pages 1230a-1277a, Volume 1, Printed Transcript of Record. Patricia O'Brien-Smith had no cash to purchase any of the business if it were incorporated, inasmuch as she had paid bills and expenses and had the balance of her money invested in two farms and stock, and she had to borrow $15,000.00, with interest at 5% per annum, from the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, upon which to live during the two years the insurance was held up, because the Joint Administrators would not require the O'Brien Company to pay Mrs. O'Brien any money from the Company to live on. See Mrs. O'Brien-Smith's Exhibits No. 27, 27a, 27b, 27c, 27d, pages 669a-677a, R. Vol. 1.

On November 5, 1935, the final paper called an "offer" to sell the interest of the estate of John A. O'Brien, deceased, in Edward J. O'Brien & Company was presented to and signed by Patricia R. O'Brien. The same day, J. G. McPherson, on behalf of the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, and George D. Caldwell, for the Louisville Trust Company, signed the "offer" as Joint Administrators. On November 14, 1935, the Joint Administrators presented to Patricia O'Brien-Smith for her signature a letter requesting the two Trust Companies as Joint Administrators to join with her in the proposal and also authorize the Trust Companies to retain sufficient funds until the status of other bequests in the will of July 7, 1933, were finally determined. This letter

was signed by Patricia O'Brien-Smith on November 14, 1935, and referred to the so-called "offer" which Patricia O'Brien and the Joint Administrators had already signed on November 5, 1935. The letter of November 14, 1935, purporting to ask the Joint Administrators to approve and sign the "offer" to sell the partnership interest, and stating: "I have this day signed an offer * * * and I am now requesting that you approve that offer," was untrue because both Patricia O'Brien-Smith and the Joint Administrators had signed the "offer" on November 5, 1935.

In the Joint Administrators so-called final settlement of the O'Brien Estate, which is their Exhibit No. 1, filed with their complaint in the within action, on page 16 thereof which is now page 72a, Volume 1, of the Printed Transcript of Record, they have tried to alter the letter dated November 14, 1935, that they finally got Mrs. O'Brien-Smith to sign, which purports to request them to approve the "offer" made by the O'Brien brothers to buy Mrs. O'Brien-Smith's partnership interest, when in truth and fact they had already signed and accepted the offer to sell the partnership interest on November 5, 1935, and had told Mrs. O'Brien-Smith if she did not sign the offer and contract to sell the interest, that they were going to sell it without her signature because they were the administrators and they did not even need her to sign it. That is the only reason she finally signed the offer. Obtaining her signature ten days later, does not relieve them of their duties and liability under their bonds as Joint Administrators, for selling the partnership interest without an audit, without an appraisal and three years before the time as provided by the Articles of the Partnership Agreement, and for less than one third of the market value.

Although the Joint Administrators told Mrs. O'Brien-Smith that her partnership interest was being sold to James

G. O'Brien, James G. O'Brien signed the document for himself and his brothers. Later, Edwin and Joseph B. O'Brien signed one of the copies of the contract, but they did not sign on all of the copies of the agreement, and Patricia O'Brien-Smith was not notified of these additional signatures, until long after the sale was closed.

On November 30, 1935, it is claimed that a check for one hundred thousand ($100,000.00) dollars payable to the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, and the Louisville Trust Company, the Joint Administrators, was delivered to J. G. McPherson by Tom Barker as attorney for the O'Briens, though in his letter of January 30, 1936, he asserted the payment had been made on November 15, 1935.

From December 1, 1935, to February 11, 1936, there were several conferences relative to completion of the sale of Patricia O'Brien-Smith's partnership interest. Patricia O'Brien-Smith was as reluctant to go through with a sale of the partnership interest after she signed the contract as she was before she signed it and she refused to go through with it until February 11, 1936. During this period Patricia O'Brien-Smith, repeatedly said at each conference that she did not want to go through with the sale. There was a conference about the middle of December, 1935, the purpose of which was to induce Patricia O'Brien-Smith to complete the sale. At this conference Patricia O'Brien-Smith, told each one present that she did not want to sell the partnership interest but wanted an audit made, for which she would pay, and to have the interest transferred to her for five years as provided by the Partnership Agreement.

In the latter part of December there was another conference with J. G. McPherson, George D. Caldwell, Mrs. Blickenstaff, and Patricia O'Brien-Smith. At this conference, J.

G. McPherson told her he was relying on the figures given them in the 1933 and 1934 Peat, Marwick, Mitchell & Company audits of the Edward J. O'Brien & Company and that he did not think an independent audit was necessary, and he would not permit one to be made. *At that time J. G. McPherson said that if Patricia O'Brien-Smith did not sign the bill of sale and deeds that he and George D. Caldwell were going to do so anyway.* In January there was a large conference attended by Tom Barker, George D. Caldwell, J. G. McPherson, F. A. Shonkwiler and Patricia O'Brien-Smith. Again Patricia O'Brien-Smith, insisted that she did not want to sell the interest but wanted an audit to determine its value and wanted it transferred to her to hold until the end of five years. George D. Caldwell became real aggressive and insisted that Patricia O'Brien-Smith must sign the bill of sale and deeds. Patricia O'Brien-Smith refused to sign the bill of sale and deeds and left the conference in tears.

On the morning of February 11, 1936, J. G. McPherson telephoned Patricia O'Brien-Smith, and requested her to come to his office and she went to his office and Mrs. Blickenstaff went with her to his office, and McPherson told Patricia O'Brien-Smith, that he had a letter from Tom Barker saying that if Patricia O'Brien-Smith did not sign the bill of sale and deeds that night, that he was going to file suit the next day. Patricia O'Brien-Smith insisted that she would not sign any papers, but agreed to attend the meeting that evening.

The final meeting was held in an office in the Kentucky Home Life Building on the night of February 11, 1936, at eight o'clock, and lasted until midnight. Even at this meeting Patricia O'Brien-Smith did not want to go through with the sale. She was told that if she did not go through with the sale the O'Briens would sue in the morning. Finally

Patricia O'Brien-Smith signed the bill of sale and deeds. George D. Caldwell insisted that Patricia O'Brien-Smith should sign a release to the Louisville Trust Company and the O'Brien brothers for holding up the insurance more than two years, and after a protracted argument, Patricia O'Brien-Smith was finally induced to sign that release also. The Insurance releases were in turn delivered over to Patricia O'Brien-Smith. Thereafter, Tom Barker, on behalf of the O'Briens, paid the balance of Two Hundred Eighty Thousand Dollars ($280,000.00) to the Joint Administrators upon the price of Three Hundred Eighty Thousand ($380,000.00) Dollars for the interest of the estate of John A. O'Brien in the partnership.

Although the Joint Administrators had assured Patricia O'Brien-Smith that all of the One Hundred Fifty One Thousand ($151,000.00) Dollars in insurance held up under the so-called insurance trust agreement would be released and paid to her on the night of February 11, 1936, only Fifty One Thousand ($51,000.00) Dollars from the Minnesota Mutual Life Insurance Company was actually paid on that night. Subsequently the Louisville Trust Company sent letters to the Minnesota Mutual and Massachusetts Mutual Life Insurance Companies releasing its claim under the insurance trust agreement and Fifty Thousand ($50,000.00) Dollars more in insurance was paid over by the Massachusetts Mutual Life Insurance Company to Patricia O'Brien-Smith. But Fifty Thousand ($50,000.00) Dollars of the Life Insurance which was with the Massachusetts Mutual Life Insurance Company, which was made payable to Mrs. O'Brien-Smith, has never been paid and cannot be obtained by Patricia O'Brien-Smith as the O'Briens agreed under the contract of November 5-15, 1935 to do. So the contract of November 5-15, 1935, has never been fulfilled by that amount of Fifty Thousand ($50,000.00) Dollars.

Patricia O'Brien-Smith had been told by J. G. McPherson and George D. Caldwell that when the Three Hundred Eighty Thousand ($380,000.00) Dollars was paid over by Tom Barker she would receive the same. But when Tom Barker paid this amount to J. G. McPherson of the Citizens Fidelity Bank & Trust Company, he would not pay Patricia O'Brien-Smith anything unless she signed an authorization to pay her attorneys Thirty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($33,333.33); William Marshall Bullitt and his law firm of Bruce & Bullitt were paid Twenty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($23,333.33), and Ed Humphrey was paid Ten Thousand ($10,000.00) Dollars, though Mrs. O'Brien-Smith protested that William Marshall Bullitt had agreed to represent her throughout the final settlement of the O'Brien estate.

After much argument and solely for the purpose of getting her money, she finally signed the authorization and J. G. McPherson paid her Two Hundred Eighty Thousand ($280,000.00) Dollars instead of Three Hundred Eighty Thousand ($380,000.0). The One Hundred Thousand ($100,000.00) Dollars balance of the purchase price for the interest of John A. O'Brien in the partnership of Edward J. O'Brien & Company and its four subsidiaries was retained by the Joint Administrators, and is still so retained.

J. G. McPherson told Patricia O'Brien-Smith that she would be given the personal stocks belonging to her that she inherited from John A. O'Brien, upon her signing the bill of sale and deeds, but on the night of February 11, 1936, when Patricia O'Brien asked him to turn over these stocks he said he had forgotten to bring them and they were in the vault and he could not get them but that he would give them to Patricia O'Brien-Smith the first thing in the morning. On the morning of February 12, 1936,

Patricia O'Brien-Smith, accompanied by F. A. Shonkwiler, went to J. G. McPherson's office to obtain John's personal stocks which cost Fifty Two Thousand ($52,000.00) Dollars, and which McPherson had assured her would be turned over to her immediately upon the signing of the bill of sale and deeds. But J. G. McPherson told her she had signed a paper giving them arthority to keep the stocks and that she couldn't have them unless she signed a paper approving everything that the Joint Administrators had done. Patricia O'Brien-Smith refused to sign such an approval of the Joint Administrators' actions, and the stocks were kept by the Citizens Fidelity Bank & Trust Company until June 28, 1946, and were not turned over to Mrs. O'Brien-Smith until she gave them Fifteen Thousand Dollars ($15,000.00) in cash from her own funds, so that they would have Forty Thousand ($40,000.00) Dollars cash to pay the Joint Administrators Fourteen Thousand ($14,000.00) Dollars fees, and additional attorneys fees of Twenty Five Thousand ($25,000.00) Dollars which was the additional amount of fees they were claiming for representing the O'Brien Estate on June 28, 1946. Yet no final settlement of the O'Brien Estate had been filed and not even a partial settlement had been filed, and was not filed until June 21, 1950, and then only a partial settlement of the Estate was filed. Another partial settlement of the O'Brien Estate was filed on January 7, 1952, and still another partial settlement was filed on August 7, 1952. The final settlement of the O'Brien Estate will still have to be filed by the Joint Administrators in the Jefferson County Court at Louisville, Kentucky to show what they spent the One Hundred Twenty Four Thousand Six Hundred Thirty One Dollars and Ninety Five Cents ($124,631.95) cash for which is now in their hands.

10.

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 23.77% Interest Was $1,216,536.51—Without An Audit. No Audit Was Ever Made of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.

1. Amount represented as market value of Mrs. O'Brien-Smith's Interest by the Joint Administrators which was not even the book value		$ 425,649.45
2. Additional values that Mrs. O'Brien-Smith is Entitled to:		
(1) The book value of Ed- J. O'Brien & Co. shown on audit report for 1935 was $2,796,726.11 — Mrs. O'Brien - Smith's 23.77% was $664,781.92 — additional book value was	$239,132.47	
(2) Profit for 1935 of Edward J. O'Brien & Co. (23.77% of $80,870.93)	19,223.02	
(3) Increase in value of securities for 1935 in the name of the O'Brien Company (23.77% of $104,762.64)	24,902.07	
(4) Goodwill of Edward J. O'Brien & Co. (23.77% of $1,168,394.50)	277,727.37	
(5) Excess of appraised value of property, plant and equipment over book value:		
(1) Edward J. O'Brien & Co. (23.77% of $209,385.23)	49,770.86	
(2) Subsidiaries (23.77% of $80,728.83)	19,189.24	

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 23.77% Interest Was $1,216,536.51—Without An Audit. No Audit Was Ever Made Of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.—Continued from preceding page.

(6) Excess of Market value over cost value of tobacco inventories:		
(1) Edward J. O'Brien & Co. (23.77% of $129,911.19)	30,879.88	
(2) Subsidiaries (23.77% of $47,661.74)	11,329.19	
(7) Interest due from Edwin J. O'Brien, Jr.		
(1) Interest on capital deficiency (23.77% of $140,741.15)	33,454.17	
(2) On his overdraft of $144.000.00 (23.77% of $30,918.65)	7,349.36	
(8) Improper charges to expense (23.77% of $23,923.26)	5,686.55	
(9) Excess Book value of investment in subsidiaries over book value as represented by Joint Administrators on Exhibit No. 53 (23.77% of $303,924.58)	72,242.87	
Total Additional Values		**$ 790,887.06**
True Value—November 30, 1935		**$1,216,536.51**

The record reveals that no books of original entry of Edward J. O'Brien & Company or any of its four subsidiaries were either voluntarily or under orders of the Court ever submitted to Patricia O'Brien-Smith, or to any accountant for Patricia O'Brien-Smith, before the sale of her partnership interest, in 1935 by the Joint Administrators.

We have set out the recapitulation of the increased values of Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company as of November 15, 1935, on the basis of twenty three and seventy seven one hundredths (23.77%) per cent, the said percentage of which the Joint Administrators admitted that John A. O'Brien owned at the time of his death when they took the threatened deductions as shown on Defendant-Appellant's Exhibit No. 53. Further Edwin J. O'Brien, Jr., and his attorney Lewis Seelbach admitted after the Joint Administrators sold Mrs. O'Brien-Smith's partnership interest, that John A. O'Brien at the time of his death owned twenty three and seventy seven one hundredths (23.77%) per cent of Edward J. O'Brien & Company and its four subsidiaries.

In addition to the other increases, we have shown the interest due from Edwin J. O'Brien, Jr., on his capital deficiency, and on his overdraft of One Hundred Forty Four Thousand ($144,000.00) Dollars, on the basis that he should be required to pay interest on his capital deficiency in the O'Brien Company, or Mrs. O'Brien-Smith, owned twenty eight and one third (28 1/3%) per cent interest in the entire Edward J. O'Brien & Company and its four subsidiaries, instead of twenty one and one fourth (21¼%) per cent, or twenty three and seventy seven one hundredths (23.77%) per cent.

The following facts have been obtained showing that the actual value of the partnership interest owned by Patricia

O'Brien-Smith in Edward J. O'Brien & Company and its four subsidiaries at the time of the contract on November 15, 1935, was worth One Million Two Hundred Sixteen Thousand Six Hundred Fifty Five Dollars and Thirty Six Cents ($1,216,655.36), which is Seven Hundred Ninety One Thousand Five Dollars and Ninety One Cents ($791,005.91) more than the amount of Four Hundred Twenty Five Thousand Six Hundred Forty Nine Dollars and Forty Five Cents ($425,649.45), which was represented by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators on behalf of the O'Briens, to Mrs. O'Brien-Smith, before they took the threatened deductions on the basis of twenty three and seventy seven one hundredths (23.77%) per cent, as shown on Mrs. O'Brien-Smith's Exhibit No. 53, R. Vol. 2, page 1920a.

1. The Book Value Of Edward J. O'Brien and Company: On November 30, 1935, the book value of Edward J. O'Brien and Company was Two Million Seven Hundred Ninety Six Thousand Seven Hundred Twenty Six Dollars and Sixty One Cents ($2,796,726.61), as shown by the audit report of the O'Brien Company as of November 30, 1935, which was never shown to Mrs. O'Brien-Smith or any accountant for her before the sale of her partnership interest by the Joint Administrators, (see Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 43, pages 1808a-1846a, Volume 2, Printed Transcript of Record), and as reported by E. J. O'Brien, Jr., to Dun & Bradstreet, Inc. on February 10, 1936. The figures were taken from the audit report of November 30, 1935, made by Peat, Marwick, Mitchell & Company the O'Brien brothers own accountants, and reported to Dun & Bradstreet, Inc. on February 10, 1936, signed E. J. O'Brien & Company, and signed by E. J. O'Brien, Jr. Of this amount, Mrs. O'Brien-Smith's share was twenty three and seventy seven one hundredths

(23.77%) per cent or Six Hundred Sixty Four Thousand Seven Hundred Eighty One Dollars and Ninety Two Cents ($664,781.92). So, the Joint Administrators misrepresented the starting figures of Mrs. O'Brien-Smith's Book Value, or as they called it, the "Present Interest", by Two Hundred Thirty Nine Thousand One Hundred Thirty Two Dollars and Thirty Seven Cents ($239,132.37), (see Mrs. O'Brien-Smith's Exhibit No. 47, pages 1873a-1878a, Volume 2, Printed Transcript of Record).

2. Profit For 1935: It is undisputed that the net profits of Edward J. O'Brien & Company for the period from November 30, 1934, to November 30, 1935, amounted to $80,-870.93 (see Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 43). Of this amount Mrs. Patricia O'Brien-Smith's share was twenty three and seventy seven one hundredths (23.77%) per cent or $19,223.02. Instead of including any of this profit, J. G. McPherson and George D. Caldwell, representatives, of the Joint Administrators, told Patricia O'Brien-Smith that there were no profits, but that Edward J. O'Brien & Company had operated at a loss for 1935. Mrs. O'Brien-Smith is supported in this statement by the deposition of Edward C. Wirotzious (see Mrs. O'Brien-Smith's Exhibit No. 35, pages 1248a-1249a, Volume 1, Printed Transcript of Record).

> "Q62 — Well, on that day in November, just a day or two before the sale, whenever it was, was there anything said in your presence from the side of the Edward J. O'Brien Company with respect to whether or not that company, during the year 1935, had earned a profit or had suffered a loss?
>
> A — I remember Mrs. O'Brien distinctly asked what the profits for the year 1935 would amount to and Mr. Barker said there were no profits for the year ended November 30, 1935, since we are sticking strictly to dates.

Q63 — Was it stated that there would be a loss or do you recall?

A — As I recall, the statement was made similar to this: There are no profits; the company operated at a loss.

Q64 — From your examination of the audit report even that which was submitted to the court and which you have testified about, what is the revealed fact with respect to whether or not there was a profit or a loss reflected in that report for the year 1935?

A — The facts were that it operated at a profit of $80,870.93, before providing for income tax.

Q65 — Net profit?

A — That is right; net profit, as shown by the statement."

3. Increase In Value Of Securities: It is undisputed that the value of the securities owned by and in the name of Edward J. O'Brien & Company increased in the period from November 30, 1934, to November 30, 1935, in the amount of $104,762.64. Of this amount of increase, Mrs. Patricia O'Brien-Smith's share was twenty three and seventy seven one hundredths (23.77%) per cent, or $24,-902.07. Instead of including any of this increase in the value of the securities, the matter was never disclosed or even mentioned to Mrs. O'Brien-Smith. It is undisputed that this increased value was not included in the amount represented by the representatives of the Joint Administrators to Patricia O'Brien-Smith.

4. Goodwill Of Edward J. O'Brien & Company: It is undisputed that the value of the goodwill was never disclosed or even mentioned by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators. It is undisputed that no value of goodwill of the Edward

J. O'Brien & Company was included in the $425,649.45 which was represented by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators, to Patricia O'Brien-Smith as the actual value of her interest at that time before the threatened deductions were made as shown on Mrs. O'Brien-Smith's Exhibit No. 53, R. Vol. 2, p. 1920a.

The value for the goodwill of Edward J. O'Brien & Company as of November, 1935, was established at One Million One Hundred Sixty Eight Thousand Three Hundred Ninety Four Dollars and Fifty Cents ($1,168,394.50). This was corroborated by Dr. W. A. Paton, Professor of Accounting of the University of Michigan, who stated that the Edward J. O'Brien & Company's goodwill was worth at least Nine Hundred Thousand ($900,000.00) Dollars without an audit being made in arriving at the amount of the goodwill of Edward J. O'Brien & Company at $1,168,394.50, and said this figure was conservative. Of this amount Mrs. O'Brien-Smith's interest would have been entitled to twenty three and seventy seven one hundredths (23.77%) per cent as of November, 1935, or the amount of Two Hundred Seventy Seven Thousand Seven Hundred Twenty Seven Dollars and Thirty Seven Cents ($277,727.37).

5. Excess Of Appraised Value Over Book Value Of The Property, Plant And Equipment Of Edward J. O'Brien & Company And Its Wholly Owned Subsidiaries American Appraisal Company Appraisal (Defendant-Appellant's Exhibit No. 44):

(1) Property, Plant and Equipment: It is undisputed that the appraised value of the property, plant and equipment, made by the American Appraisal Company of Edward J. O'Brien & Company for Mrs. O'Brien-Smith, after

the sale of her partnership interest as stated by Fred S. Olson, President, exceeded the book value as of November 30, 1935, by $209,385.23 for Edward J. O'Brien & Company, and by $80,728.83 for the wholly owned subsidiaries as shown on Mrs. O'Brien-Smith's Exhibit No. 44, pages 1847a-1857a, Volume II, Printed Transcript of Record. It is also undisputed that none of this excess or actual appraised value was considered or included in the figure of $425,649.45 which was represented by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators, to Patricia O'Brien-Smith as the true market value of her interest in the property, plant and equipment, before the threatened deductions were made as shown on Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 53. This difference would amount upon the basis of Mrs. O'Brien-Smith's twenty three and seventy seven one hundredths (23.77%) per cent interest, to an increase of Forty Nine Thousand Seven Hundred Seventy Dollars and Eighty Six Cents ($49,770.86) for Edward J. O'Brien & Company and Nineteen Thousand One Hundred Eighty Nine Dollars and Twenty Four Cents ($19,189.24) for the four wholly owned subsidiaries.

(2) Inventory: It is undisputed that the market value of the tobacco inventory exceeded the book value. Even the audit of Peat, Marwick, Mitchell & Company for November 30, 1935, which was obtained after the sale of Mrs. O'Brien-Smith's partnership interest, by the Joint Administrators, contains the admission "inventories are valued at cost generally, which is lower than market with due regard to the various grades" (Defendant-Petitioner's Exhibit No. 43, R. Vol. II-1809a-1846a). Because Mrs. O'Brien-Smith was denied the right to have an audit made, or to see any of the original books of the O'Brien Company or its subsidiaries to ascertain the true market value of the tobacco

inventories, it is impossible to say to a precise dollar what the increased value is that should be added to the book value to arrive at a true market value for the purpose of the sale of the partnership interest. However, an accountant, has estimated the difference between the market value of the tobacco inventory and the book value or cost by taking the average percentage of gross profits from the Audits for 1934 and 1935 (made by the O'Brien Company's own accountants) and adding that to the cost of the tobacco inventory as shown. That gives an increase in the tobacco inventory for the partnership of $129,911.19, and $47,661.47 for the wholly owned subsidiaries. Thus Mrs. O'Brien-Smith's interest as of November, 1935, was entitled to twenty three and seventy seven one hundredths (23.77%) per cent of these increased values of tobacco inventories, or $30,879.88 for Edward J. O'Brien & Company and $11,329.19 for the wholly owned subsidiaries.

6. Interest Due From Edwin J. O'Brien, Jr.: It is undisputed that Edwin J. O'Brien, Jr., withdrew large amounts from the partnership of Edward J. O'Brien & Company over the entire period from January 1, 1931, to November 30, 1935. It is likewise undisputed that Edwin J. O'Brien, Jr. not only had a deficiency but actually ran an overdraft of over One Hundred Forty Four Thousand ($144,000.00) Dollars from the partnership. It is undisputed that this fact was known to the Joint Administrators and was never disclosed to Patricia O'Brien-Smith, by J. G. McPherson, and George D. Caldwell, representatives of the Joint Administrators, and that no value was included for this borrowed money. It is undisputed that the amount of the interest on the capital deficiency at 6% per annum would amount to $140,741.15. Mrs. O'Brien-Smith's twenty three and seventy seven one hundredths (23.77%) per cent of this amount would be $33,-

454.17. It is undisputed that the amount of interest on the overdraft of over $144,000.00 at 6% per annum would amount to a net charge of $30,918.65 of which Mrs. O'Brien-Smith's share of capital overdraft interest would amount to $7,349.36.

7. **Improper Charges To Expense**: The system of book value maintained by Edward J. O'Brien & Company was to keep the same at a very minimum. It was constantly sought to charge off whatever could be charged off to save federal and state taxes. In some cases the depreciation was much higher than the Government would allow and the Treasury Department rejected the charge off or charge down. Also excessive losses were claimed on abandoned property which were not allowed by the Government. One item taken from the audit made by the O'Brien brothers accountants was $23,923.26, including the debt of A. G. Martin, which should have been added to the book value to give the true value of Edward J. O'Brien & Company, as of November 5-15, 1935. The twenty three and seventy seven one hundredths (23.77%) per cent of this amount would be $5,686.55 by which amount Mrs. O'Brien-Smith's interest was entitled to be increased.

8. **Excess Book Value Of Subsidiaries On Audits Of The Subsidiaries For 1935 Over Book Value As Shown On Audit Of Edward J. O'Brien & Company For 1934, Made By O'Brien Brothers Own Accountants**: It is undisputed that the book value of the subsidiaries on the subsidiary audits for 1935, which were never shown to Mrs. O'Brien-Smith or any accountant for her before the sale of her partnership interest, exceed the book value shown on the Edward J. O'Brien & Company books as shown by the company's audit of 1934, by $303,924.58. It is undisputed that the subsidiaries were carried at $252,500.00 on the audit report of Edward J. O'Brien & Company for the

year ending November 30, 1934, while the book value on the audit reports of the wholly owned subsidiaries themselves shows $556,424.58 for the year ending October 31, 1935 (see Defendant-Petitioner Mrs. O'Brien-Smith's Exhibits Nos. 48, 49 and 50, pages 1879a-1895a, Volume 2, Printed Transcript of Record). It is undisputed that this difference was never disclosed or even mentioned to Patricia O'Brien-Smith nor included in the figure of $425,-649.45 which the Joint Administrators represented as the market value of John A. O'Brien's interest. 23.77% of this increased value of $303,924.58 would amount to $72,242.87.

The four subsidiaries wholly owned by Edward J. O'Brien & Company, on October 31, 1935, had a book value of Five Hundred Fifty Six Thousand Three Hundred Ninety Four Dollars and Fifty Eight Cents ($556,394.58).

The Tobacco Rehandling Company Limited, Incorporated on October 31, 1935, had a book value of Three Hundred Forty One Thousand Two Hundred Fifty One Dollars and Eighty Cents ($341,251.80), as taken from the audit report of October 31, 1935 made by Peat, Marwick, Mitchell & Company and reported to Dun & Bradstreet, Inc. signed by H. Smart, Secretary. See Mrs. O'Brien-Smith's Exhibit No. 48, R. Vol. 2, pp. 1879a-1884a.

The H. N. Martin Leaf Tobacco Company on October 31, 1935, had a book value of One Hundred Ninety Four Thousand Seven Hundred Thirty Five Dollars and Forty Eight Cents ($194,735.48), as taken from the Audit Report made by Peat, Marwick, Mitchell & Company and reported to Dun & Bradstreet, Inc. signed by H. Smart, Secretary. See Mrs. O'Brien-Smith's Exhibit No. 49, R. Vol. 2, pp. 1885a-1889a.

The Western Tobacco Company on October 31, 1935, had a book value of Twenty Thousand Four Hundred Thirty

Seven Dollars and Thirty Cents ($20,437.30), as taken from the Audit Report of Peat, Marwick, Mitchell & Company of October 31, 1935, and reported to Dun & Bradstreet, Inc. by E. J. O'Brien, Jr. See Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 50, pages 1890a-1895a, Volume 2, Printed Transcript of Record. The total book value of the four subsidiaries amounted to Five Hundred Fifty Six Thousand Three Hundred Ninety Four Dollars and Fifty Eight Cents ($556,394.58) for three of the wholly owned subsidiaries. Mrs. O'Brien-Smith's capital in the four subsidiaries had a book value of One Hundred Thirty Two Thousand Two Hundred Fifty Five Dollars and Four Cents ($132,255.04).

The same three subsidiaries which J. G. McPherson and George D. Caldwell, the Joint Administrators, had told Mrs. O'Brien-Smith, only had a book value of Two Hundred Fifty Two Thousand Five Hundred Dollars ($252,500.00), but that they should be reduced fifty (50%) per cent in order to arrive at the true market value of the subsidiaries, making a figure of One Hundred Twenty Six Thousand Two Hundred Fifty Dollars ($126,250.00) on the basis of her owning twenty three and seventy seven (23.77%) per cent of the subsidiaries, they then deducted Thirty Thousand Nine Dollars and Sixty Two Cents ($30,009.62).

None of the audits for any of the four subsidiaries were ever shown to Mrs. O'Brien-Smith, or any accountant on her behalf until after the sale of her partnership interest in the O'Brien Company and its four subsidiaries. See affidavit of Edward C. Wirotzious which consists of fifty two pages and each page signed by him. Mrs. O'Brien-Smith's Exhibit No. 35, R. Vol. 1, pp. 1230a-1276a.

When the Joint Administrators filed their so-called final settlement of the O'Brien estate in the Jefferson County

Court, and in their Complaint filed in the within action, they do not state why Mrs. O'Brien-Smith's partnership interest was sold for Thirty Four Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($34,418.73) less than the book value of Four Hundred Fifty Two Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($452,418.73), as they represented to her. They misrepresented the truth, and state that the Four Hundred Fifty Two Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($452,418.73) is the appraised value of her interest when, in truth and fact, it was only a depreciated book value placed on it by Peat, Marwick, Mitchell & Company, as of December 31, 1933, for tax purposes, who are only accountants and not appraisers. The partnership interest was never appraised by anyone and the Peat, Marwick, Mitchell & Company, stated in each of their audit reports that no appraisal had ever been made of the partnership interest and that they took the word of Edwin J. O'Brien, Jr., as to the valuations placed on the partnership interest, in the Audit Reports. J. G. McPherson and George D. Caldwell admitted under oath that they did not have any appraisal made of any kind to ascertain the market value of the interest of the estate of John A. O'Brien.

The Joint Administrators stated in their complaint that the Thirty Four Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($34,418.73) was a disbursement, which statement is untrue and without any foundation (see pages 21 and 23 of the Joint Administrators' Complaint, which is found on pages 37a and 39a of R. Vol. 1).

11.

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 28.33% Interest Was $1,540,439.55—Without An Audit. No Audit Was Ever Made Of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.

1.	Amount represented as market value of Mrs. O'Brien-Smith's Interest by the Joint Administrators which was not even the book value		$ 425,649.45
2.	Additional values that Mrs. O'Brien-Smith is Entitled to:		
	(1) The book value of Edward J. O'Brien & Co. shown on audit report for 1935 was $2,796,726.11—Mrs. O'Brien-Smith's 28.33% was $792,312.51—additional book value was	$366,663.06	
	(2) Profit for 1935 of Edward J. O'Brien & Co. (28.33% of $80,870.93)	22,910.73	
	(3) Increase in value of securities for 1935 in the name of the O'Brien Company (28.33% of $104,762.64)	29,679.25	
	(4) Goodwill of Edward J. O'Brien & Co. (28.33% of $1,168,394.50)	331,006.06	
	(5) Excess of appraised value of property plant and equipment over book value:		
	(1) Edward J. O'Brien & Co. (28.33% of $209,385.23)	59,318.94	
	(2) Subsidiaries (28.33% of $80,728.83)	22,870.48	
	(6) Excess of Market value over cost value of tobacco inventories:		
	(1) Edward J. O'Brien &		

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 28.33% Interest Was $1,540,439.55—Without An Audit. No Audit Was Ever Made Of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.—Continued from preceding page.

Co. (28.33% of $129,911.19)	36,803.84	
(2) Subsidiaries (28.33% of $47,661.74)	13,501.57	
(7) Interest due from Edwin J. O'Brien, Jr.		
(1) On his overdraft of $144,000.00 (28.33% of $30,918.65)	8,758.25	
(8) Improper charges to expense (28.33% of $23,923.26)	6,777.46	
(9) Excess Book value of investment in subsidiaries over book value as represented by Joint Administrators on Exhibit No. 53 (28.33% of $304,423.48)	86,243.17	
(10) Profits for 1936 of Edward J. O'Brien & Co. and its four subsidiaries (28.33% of $148,722.77)	42,143.16	
(11) Profits for 1937 of Edward J. O'Brien & Co. and its four subsidiaries (28.33% of $189,867.62)	53,789.50	
(12) Profits for 1938 of Edward J. O'Brien & Co. and its four subsidiaries (28.33% of $121,160.01)	34,324.63	
Total Additional Values		**$1,114,790.10**
True Value—November 30, 1935		**$1,540,439.55**

We made the last computation along the lines that either Edwin J. O'Brien, Jr. should have been required by the Joint Administrators to pay six (6%) per cent interest per annum on his capital deficiency in the Edward J. O'Brien & Company and its four subsidiaries, on November 5-15, 1935, for the preceding years of his capital deficiency or the Estate of John A. O'Brien at the time of his death owned twenty eight and one third (28 1/3%) per cent interest in the entire Edward J. O'Brien & Company and its four subsidiaries.

Further, Edwin J. O'Brien, Jr. should have been required by the Joint Administrators of the estate of John A. O'Brien to pay interest at the rate of six (6%) per cent per annum on his overdraft of One Hundred Forty Four Thousand ($144,000.00) Dollars, before they sold Mrs. O'Brien-Smith's partnership interest on November 5-15, 1935.

Under the Articles of Co-partnership (Mrs. O'Brien-Smith's Exhibit No. 25, pages 663a-669a, Volume 1, Printed Transcript of Record), it provided that Mrs. O'Brien-Smith's interest should remain in the O'Brien Company and its four subsidiaries, for five years, to wit: until December 31, 1938. We obtained the amount of the net profits of the Edward J. O'Brien & Company for 1936, 1937 and 1938, after the partnership interest was sold by the joint Administrators, and Mrs. O'Brien-Smith's twenty eight and one third (28 1/3%) per cent interest in the profits for the years of 1936, 1937 and 1938, are shown on the computation set forth herein.

The Joint Administrators violated the terms of the partnership agreement of Edward J. O'Brien & Company, when they sold Mrs. O'Brien-Smith's partnership interest in the O'Brien Company and its four subsidiaries, before Decem-

ber 31, 1938, and when they did not have an appraisal made to determine the market value of her interest, and when they did not have an audit made.

Article 6, of the partnership agreement dated January 23, 1931, stated:

> "In the event the estate elects to withdraw from the partnership at the expiration of five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the Company, or by appraisement, plus profits and interest, if any."

Article 6, of the partnership agreement should have been the yard stick by which Mrs. O'Brien-Smith should have been paid for her interest in the O'Brien partnership and its four subsidiaries.

The Court of Appeals of Kentucky in its opinion in the Rescission Suit (which was against the O'Brien brothers only), ruled that Mrs. O'Brien-Smith was the sole beneficiary of the will and of the Estate of John A. O'Brien, and the so-called Insurance Trust Agreement, under which the Joint Administrators were claiming the Two Hundred One Thousand ($201,000.00) Dollars Life Insurance for the O'Brien brothers was never in effect, and if so was expressly revoked before John A. O'Brien died, therefore, the Joint Administrators are stripped of all their claimed compromising points, which were only bogus claims.

It was stated in the Audit Report for the year ended November 30, 1935, of Edward J. O'Brien & Company made by the O'Brien Company's own accountant Peat, Marwick, Mitchell & Company, on page 3 thereof (Mrs. O'Brien-Smith's Exhibit No. 43, page 1812a of Volume 2, Printed Transcript of Record) that:

> "In conformity with the aforementioned provision of the Articles of Co-Partnership, the Estate of John

> A. O'Brien, deceased, automatically became a partner in the firm on the death of John A. O'Brien on January 1, 1934, and continued to be a partner until November 15, 1935."

The Audit Report further stated in Defendant-Appellant's Exhibit No. 43 on page 1811a of Volume 2, of Printed Transcript of Record, that:

> Under an agreement dated November 15, 1935, between James G. O'Brien and the Executors (Joint Administrators in this action) of the Estate of John A. O'Brien, deceased, to which the other partners and the retired partner, referred to above (Marie O'Brien Michael) gave their consent, Mr. James G. O'Brien agreed to purchase the partnership interest of the Estate of John A. O'Brien.

Thus, it was the Joint Administrators who sold Mrs. O'Brien-Smith's partnership interest in the O'Brien Company, and it was not Mrs. O'Brien-Smith who sold the interest.

12. The Joint Administrators Transferred Stocks And Securities To A Former Partner Of The O'Brien Company In Order To Reduce The Value Of Mrs. O'Brien-Smith's Partnership Interest In The Edward J. O'Brien Tobacco Company And Its Four Subsidiaries.

On June 28, 1934, without the knowledge or consent of Patricia O'Brien-Smith, the Joint Administrators, The Louisville Trust Company, and the Fidelity & Columbia Trust Company now the Citizens Fidelity Bank and Trust Company, joined with Edwin J. O'Brien, Jr., and his brothers, and transferred certain shares of stocks and securities which were owned by the Edward J. O'Brien & Company, valued at several hundred thousand dollars to Mrs. Marie O'Brien Michael, a former partner in the

O'Brien Company and its four subsidiaries, claiming that she had not been paid for her partnership interest of seventeen (17%) per cent, which she sold to four of the other partners of the O'Brien Company on May 29, 1928. Even though Mrs. Michael had already been paid in full for her seventeen (17%) per cent interest, or share in the said stocks and securities and her entire partnership interest in the O'Brien Company, and its four subsidiaries, prior to November 30, 1933, when she sold her interest.

Seventeen (17%) per cent of the following shares of stocks and securities owned by and in the name of the Edward J. O'Brien & Company, which were transferred to Marie O'Brien Michael in 1934 are listed below:

Atlantic Coast Line Railroad Company
Canadian Pacific Railway Company
Delaware & Hudson Company
Louisville & Nashville Railroad Company
New York Central Railroad Company
Norfolk & Western Railway Company
Standard Gas and Electric Company
United Light and Power Company
Larus & Brother Company
P. Lorillard Company
R. J. Reynolds Tobacco Company
Standard Oil Company of Indiana
Standard Oil Company of Kentucky
Commonwealth Life Insurance Company
Continental Motors Corporation
Philadelphia and Reading Coal and Iron
United States Steel Corporation
Corporation)
American Commonwealths Power Corporation
Standard Oil Company of New York (Socony Vacuum

All of the above named companies transferred seventeen (17%) per cent of the above listed stocks owned by the Edward J. O'Brien & Company, to Mrs. Marie O'Brien

Michael, except the Standard Oil Company of Indiana, which had been requested to issue to her, the following shares of stock:

One Certificate for 500 shares in the name of—
Mrs. Marie O'Brien Michael
One Certificate for 112 shares in the name of—
Mrs. Marie O'Brien Michael

The Standard Oil Company of Indiana refused to transfer six hundred twelve (612) shares of stock of Standard Oil Company of Indiana, held in the name of Edward J. O'Brien & Company, to Mrs. Marie O'Brien Michael, without the approval, consent, and the signature of Mrs. Patricia O'Brien-Smith, whom they considered a full partner of the Edward J. O'Brien & Company, however, later they did make the transfer of the said stocks without the knowledge or approval of Mrs. O'Brien-Smith, and she did not learn that the Joint Administrators had signed with Edwin J. O'Brien, Jr. to make the transfer of the said stocks to Mrs. Marie O'Brien Michael until long after they had made the transfers of the stocks and sold her partnership interest in the O'Brien Company and its four subsidiaries. Since the District Court, refused to have a trial of the within action, the Defendant-Appellant, was unable to obtain all the facts pertaining to the transfer of the stocks by the Joint Administrators, because her attorney was never permitted to cross examine George D. Caldwell, or J. G. McPherson concerning the transfer of the stocks and securities.

In order to get the stocks transferred from the name of Edward J. O'Brien & Company on June 28, 1934, Edwin J. O'Brien, Jr., signed and swore to an affidavit that on June 11, 1930, the partnership of Edward J. O'Brien & Company was composed of his mother and three brothers; that on

January 1, 1934, John A. O'Brien died; that under agreements set forth in Articles of Partnership his interest would remain in said partnership until five (5) years from the date of his death, to wit, until December 31, 1938. See Mrs. O'Brien-Smith's Exhibit No. 64, page 1948a, Volume 2, Printed Transcript of Record, also see Mrs. O'Brien-Smith's Exhibits No. 61, 62 and 63, pages 1941a through 1948a, Volume 2, Printed Transcript of Record.

This issue has never been before any Court before and it has never been ruled on by any Judge of any Court.

In the Audit Report as of November 30, 1935, there was set up the amount of One Hundred Thirty Eight Thousand Six Hundred Nine Dollars and Twenty One Cents ($138,-609.21), as being the amount payable to a former partner, which represents a liability shown by the books as due to someone. That was either an added balance to Mrs. Michael or else that was the excess overdraft of Edwin J. O'Brien, Jr., which reflected his withdrawal.

The overdraft of Edwin J. O'Brien, Jr., which would be in the nature of an asset, or account receivable would be off-set by the account payable of a similar amount as representing the account payable to former partners.

Sach a set-up liability reduced the total net worth of the O'Brien Company and its four subsidiaries, and the value of Mrs. O'Brien-Smith's partnership interest, which the Joint Administrators approved and sanctioned with the O'Brien brother, see deposition of Edward C. Wirotzious, Mrs. O'Brien-Smith's Exhibit No. 35, R. Vol. 1, pp. 1260a-1269a.

13. The Joint Administrators Violated Their Written Agreements To Act As Administrators For One And One Half (1½%) Per Cent, When They Filed Their Complaint For And Were Granted $38,967.82 By The District Court.

The Joint Administrators violated their written agreements to act as administrators for one and one half (1½%) per cent, when they filed their complaint for and were granted Thirty Eight Thousand Nine Hundred Sixty Seven Dollars and Eighty Two Cents ($38,967.82) by the District Court. The Louisville Trust Company had a written agreement dated July 7, 1933, with John A. O'Brien before his death, that they would act as administrator of his will and his estate for one and one half (1½%) per cent on the total assets of his estate. They reported that the total assets of the O'Brien Estate was Five Hundred Nine Thousand ($509,000.00) Dollars in the inventory filed in the office of the Clerk of the Jefferson County Court, on May 31, 1934. See Mrs. Smith's Exhibit No. 55, pages 1927a-1928a, and Exhibit No. 75, pages 1982a-1989a, Volume 2, Printed Transcript of Record.

William Marshall Bullitt, representing the Citizens Fidelity Bank & Trust Company, as well as Mrs. O'Brien-Smith, and J. G. McPherson, Vice-President of the Citizens Fidelity Bank & Trust Company, agreed with Mrs. O'Brien-Smith, that if their Trust Company was appointed as Joint Administrator with The Louisville Trust Company, that the two Trust Companies would agree to act as administrators and for a final settlement of the O'Brien estate for one and one half (1½%) per cent each, on the total assets of the estate, making a total of three (3%) per cent. The Citizens Fidelity Bank & Trust Company further confirmed their agreement to act as Joint Administrator of the O'Brien estate for one and one half (1½%) per cent

to each of the Trust Companies, and that the total amount of the Joint Administrators' fees would be Fourteen Thousand ($14,000.00) Dollars for the final settlement of the John A. O'Brien estate, by their letter dated October 25, 1935, addressed to Mrs. John A. O'Brien, (now Smith) Alta Vista Road, Louisville, Kentucky, and signed by J. G. McPherson, Vice-President of the Fidelity & Columbia Trust Company now Citizens Fidelity Bank & Trust Company. See the letter which is Mrs. Smith's Exhibit No. 56, pages 1929a-1930a, R. Vol. 2.

On March 25, 1936, Ernest Kampfmueller, Assistant Treasurer of Fidelity & Columbia Trust Company, signed and filed an affidavit for the Joint Administrators, with the Kentucky State Tax Commissioner, that the Fidelity & Columbia Trust Company and The Louisville Trust Company were asking the sum of Fourteen Thousand ($14,000.00) Dollars as compensation for acting as Joint Administrators for the estate of John A. O'Brien, deceased. See the affidavit, Mrs. Smith's Exhibit No. 58, pages 1933a-1934a, Volume 2, Printed Transcript of Record, which reads as follows:

"STATE OF KENTUCKY
COUNTY OF JEFFERSON SS

(1) Affiant, Ernest Kampfmueller, states that he is Assistant Treasurer of FIDELITY AND COLUMBIA TRUST COMPANY, which company is the duly qualified and acting ADMINISTRATOR WITH THE WILL ANNEXED OF THE Estate of JOHN A. O'BRIEN, jointly with the LOUISVILLE TRUST COMPANY.

Affiant states that the Fidelity and Columbia Trust Company and the Louisville Trust Company are asking the sum of Fourteen Thousand Dollars ($14,000) as compensation for services rendered and that said amount will be paid and divided equally between the

Fidelity and Columbia Trust Company and the Louisville Trust Company before the estate is settled.

(signed) Ernest Kampfmueller

Subscribed and sworn to before me this 25 day of March 1936. My notarial commission expires Sept. 7, 1939.

(signed) Henrietta Millett
Notary Public, Jefferson County, Kentucky.

STATE OF KENTUCKY
COUNTY OF FRANKLIN Set.

I, Ruth Lucas Stafford, a Notary Public in and for the County and State aforesaid, do certify that the foregoing is a true and correct copy of same as appears of record in the State Tax Commission in regards to the John A. O'Brien estate.

Given under my hand this the 17th day of August, 1937.

(signed) Ruth Lucas Stafford
Notary Public, Franklin County, Ky.
My commission expires Jan. 9, 1938."

14. The Attorneys For The Joint Administrators Violated The Terms Of Their Agreement To Settle The Estate Of John A. O'Brien For $25,000.00, When They Filed Their Complaint For And Were Awarded An Additional $52,000.00 With 6% Interest A Total Of $107,333.33 By The District Court.

The attorneys for the Joint Administrators violated the terms of their agreement to settle the Estate of John A. O'Brien for Twenty Five Thousand ($25,000.00) Dollars when they filed their complaint and were awarded an additional Fifty Two Thousand ($52,000.00) Dollars with six (6%) per cent interest thereon, by the District Court, making a total of One Hundred Seven Thousand Three Hun-

dred Thirty Three Dollars and Thirty Three Cents ($107,-333.33) without a trial of the within action.

William Marshall Bullitt of the law firm of Bruce & Bullitt, now the law firm of Bullitt, Dawson and Tarrant, made an agreement with Mrs. Patricia O'Brien-Smith to represent her and the Joint Administrators of the estate of John A. O'Brien in the final settlement of the O'Brien estate for Twenty Three Thousand ($23,000.00) Dollars. This agreement is substantiated by the two (2) affidavits signed and filed by Ernest Kampfmueller, Assistant Treasurer of the Fidelity & Columbia Trust Company, (now Citizens Fidelity Bank & Trust Company) on March 20, 1936.

On March 20, 1936 Ernest Kampfmueller, Assistant Treasurer of the FIDELITY & COLUMBIA TRUST COMPANY, SIGNED AND FILED AN AFFIDAVIT FOR THE JOINT ADMINISTRATORS in the office of the Kentucky State Tax Commissioner, and stated that as personal representatives of the estate of John A. O'Brien, that the Joint Administrators had paid for legal services rendered to them for the final settlement of the O'Brien estate the sum of Twenty Five Thousand ($25,000.00) Dollars, and that the affidavit was made for the purpose of inducing the State Tax Commissioner of the State of Kentucky, in determining the amount of Kentucky Inheritance tax due from the estate of John A. O'Brien, to allow as a proper deduction for attorneys' fees for the final settlement of the O'Brien estate, the amount of Twenty Five Thousand ($25,000.00) Dollars. See Mrs. Smith's Exhibit No. 17, R. Vol. 1, pp. 635a-636a, which is as follows:

(1)
"STATE OF KENTUCKY
COUNTY OF JEFFERSON SS:

Affiant, Ernest Kampfmueller, states that he is Assistant Treasurer of the Fidelity and Columbia Trust Company of Louisville, Kentucky, which company is the duly qualified and acting administrator with the will annexed of the estate of John A. O'Brien jointly with the Louisville Trust Company.

Affiant states that as personal representative of the Estate of John A. O'Brien they have paid to Edward P. Humphrey for legal services rendered the sum of Ten Thousand Dollars ($10,000.00) and have also paid to Bruce & Bullitt for legal services rendered the sum of Thirteen Thousand Dollars ($13,000.00).

Affiant further states that before the estate is settled there will be paid to Gordon, Laurent and Ogden for legal services rendered a sum of not less than Two Thousand Dollars ($2,000.00).

This affidavit is made for the purpose of inducing the State Tax Commission of the State of Kentucky in determining the amount of Kentucky Inheritance tax due from the estate of John A. O'Brien to allow as a proper deduction attorney fees in the amount of Twenty Five Thousand Dollars ($25,000.00).

(signed) Ernest Kampfmueller

Subscribed and sworn to before me this 20th day of March, 1936.

My notarial commission expires Sept. 7, 1939.

(signed) Henrietta Millett
Notary Public, Jefferson County, Kentucky

STATE OF KENTUCKY
COUNTY OF FRANKLIN Sct:

I, Ruth Lucas Stafford, a Notary Public in and for the County and State aforesaid, do certify that the foregoing is a true and correct copy of same as appears of record in the State Tax Commission in the papers of the John A. O'Brien estate.

Given under my hand this the 17th day of August, 1937.

(signed) Ruth Lucas Stafford
Notary Public, Franklin County, Ky.
My commission expires Jan. 9, 1938."

On August 29, 1936, D. S. Bliss, Deputy Commissioner of Internal Revenue, Washington, D. C., wrote a third letter to the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, in reference to the report to them by the Joint Administrators that the Joint Administrators' fees of Fourteen Thousand ($14,000.00) Dollars, and attorneys' fees of Twenty Five Thousand ($25,000.00) Dollars, proposed to be allowed as deductions from Federal Estate taxes was for the final settlement of the estate of John A. O'Brien. See Mrs. Smith's Exhibit No. 19, R. Vol. 1, pp. 640a-642a, which is as follows:

(2) "TREASURY DEPARTMENT
WASHINGTON

Office Of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To
MT-ET-CI-2244-Kentucky
Estate of John A. O'Brien
Date of death—January 1, 1934

AUG 29 1936

Fidelity and Columbia Trust Company, Administrator,
Louisville, Kentucky.

Sirs:

Reference is made to Bureau letters of January 29 and June 15, 1936, which tentatively determined a deficiency in estate tax in the above-named estate.

A protest against the tentative determination was filed in this office on April 8, 1936, and additional evidence in support of a claim for deductions on account of payment of Federal income taxes was received

on July 6, 1936. The protest relates to the following items and adjustments are proposed as indicated:

DEDUCTIONS

	Returned	Tentatively Determined	Proposed Redetermination
Administrator's commission	$15,279.38	$0.00	$14,000.00
Attorneys' fees	10,000.00	0.00	25,000.00
Additional Federal income tax for year 1933 and interest to date of death	0.00	0.00	1,153.14

It is proposed to allow a deduction for administrator's commission in the amount of $14,000.00, which the affidavit of the administrator shows will be claimed and paid.

It is proposed to allow deduction for attorneys' fees in the amount of $25,000.00. The affidavit of the administrator shows that $23,000.00 has been paid and that an additional $2,000.00 will be paid.

No deduction is proposed for State and County taxes which were paid in the sum of $342.78, since these taxes had not accrued prior to the date of decedent's death and are not an allowable deduction under Article 37 of Regulations 80.

2-Estate of John A. O'Brien

Deduction is allowed for deficiency income tax for the year 1933 together with interest thereon from November 1933 to the date of the decedent's death. No deduction is allowed for interest that accrued after the date of decedent's death.

The following summary is submitted:

	Proposed Redetermination
Gross estate	$693,742.05
Deductions, 1926 Act	149,644.40
Net estate, 1926 Act	$544,097.65
Net estate, 1932 Act	$594,097.65
Gross tax, 1926 Act	$ 19,704.88
Credit for estate or inheritance tax	15,763.90
Net tax, 1926 Act	$ 3,940.98
Total gross taxes, 1926 and 1932 Acts	$ 61,232.69
Gross tax, 1926 Act	19,704.88
Gross additional tax	$ 41,527.81
Net tax, 1926 Act	3,940.98
Total net tax	$ 45,468.79
Returned tax	41,683.81
Deficiency	$ 3,784.98

Execution of the enclosed waiver will enable the Bureau to assess the deficiency and expedite the closing of this case and will also stop the running of interest.

This is not a final determination of the tax liability in this case and no appeal herefrom lies to the Board of Tax Appeals.

Your reply within twenty days from the date of this letter will be appreciated.

Respectfully,
(signed) D. S. Bliss
D. S. Bliss
Deputy Commissioner."

Encl.—Waiver

It will be noted from these three Exhibits, the two affidavits of Ernest Kampfmueller, and the third letter from D. S. Bliss, Deputy Commissioner of Internal Revenue,

Washington, D. C., that the Joint Administrators had agreed in 1934, and 1936, and represented to the State Tax Commissioner of the State of Kentucky and to the Commissioner of Internal Revenue, that their fees would be Fourteen Thousand ($14,000.00) Dollars, for the final settlement of the O'Brien estate, and that their attorneys' fees would be Twenty Five Thousand ($25,000.00) Dollars for the final settlement of the estate of John A. O'Brien.

It will be further noted from the Deputy Commissioner's letter, that the total assets of the estate of John A. O'Brien, deceased, reported by the Joint Administrators had total assets and was valued at Six Hundred Ninety Three Thousand Seven Hundred Forty Two Dollars and Five Cents ($693,742.05). But in the Joint Administrators' complaint, filed in the within action, and in their inventory of the O'Brien estate copied therein, a copy of which they had filed in the O'Brien Estate on May 31, 1934, in the Jefferson County Court, (Mrs. O'Brien-Smith's Exhibit No. 75, pages 1982a-1989a, Volume 2, Printed Transcript of Record) and also in their Exhibit No. 1, filed with their complaint. In the within action, they swore that the total assets of the estate of John A. O'Brien at the time of his death was only Five Hundred Nine Thousand Five Hundred Seventy Five Dollars and Eighty Six Cents ($509,575.86), see Plaintiffs-Respondents' complaint page 21, which is page 37a, Volume 1, of the Printed Transcript of Record. Yet the Joint Administrators sold the partnership interest inherited by Mrs. O'Brien-Smith in the Edward J. O'Brien Tobacco Company and its four subsidiaries, for Three Hundred Eighty Thousand ($380,000.00) Dollars. See the inventory which is Mrs. O'Brien-Smith's Exhibit No. 75, R. Vol. 2, pp. 1982a-1988a.

Edward P. Humphrey was not employed by Mrs. O'Brien-Smith to represent her or the Joint Administrators in the

final settlement of the O'Brien estate, or in any matter pertaining to her partnership interest from the O'Brien estate and they knew it. Edward P. Humphrey was employed by Mrs. O'Brien-Smith to collect the Life Insurance left her by her husband of Two Hundred One Thousand ($201,000.00) Dollars, and they knew that. When the Joint Administrators had Ernest Kampfmueller, Assistant Treasurer of the Fidelity & Columbia Trust Company, file an affidavit under oath, that Edward P. Humphrey was paid Ten Thousand ($10,000.00) Dollars to represent the Joint Administrators in the final settlement of the O'Brien estate, they knew this was not true because they had paid the law firm of Bruce & Bullitt, for legal services rendered to them, the sum of Twenty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($23,333.33).

The Louisville Trust Company also had paid the law firm of Gordon, Laurent & Ogden, who was representing The Louisville Trust Company and the three brothers of John A. O'Brien, to represent them in the final settlement of the O'Brien estate for which they paid them the sum of Two Thousand ($2,000.00) Dollars, so, if their claims in their complaint for additional fees for the Joint Administrators and for their attorneys for the final settlement of the O'Brien estate which the District Court awarded, are valid then they have made fraudulent misrepresentations both to the Tax Commissioner of the State of Kentucky, and to the Commissioner of Internal Revenue at Washington, D. C., regarding the Joint Administrators' fees, the lawyers fees, and the Market value of the Estate of John A. O'Brien.

The District Court awarded the Joint Administrators, The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, Twenty Three Thousand Seven Hundred Fifty Six Dollars and Ninety Eight Cents ($23,-756.98) with six (6%) per cent interest from March 5,

1952 to November 9, 1962, a total sum of Thirty Eight Thousand Nine Hundred Sixty Seven Dollars and Eighty Two Cents ($38,967.82), and to the attorneys for the Joint Administrators, a total sum of One Hundred Seven Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($107,333.33).

Under the statutes and laws of Kentucky, it was the duty of the Joint Administrators to turn over to Mrs. O'Brien-Smith the partnership interest that she inherited from her husband John A. O'Brien, in the Edward J. O'Brien Tobacco Company, and its four subsidiaries, nine months after his death, to-wit on October 1, 1934, and through their representatives they had stated to her during the entire first nine months after John's death, that they would turn it over to her.

The brothers of John A. O'Brien never at any time threatened to file suit to set aside John A. O'Brien's last will, dated September 22, 1933.

From October, 1934, until May 1, 1935, the situation remained the same except for various conferences. In the meantime, Patricia O'Brien-Smith did not receive any of the insurance money from the Minnesota Mutual Life Insurance Company and the Massachusetts Mutual Life Insurance Company.

About May 1, 1935, one and a half years after William Marshall Bullitt was employed by Mrs. O'Brien-Smith, she learned for the first time that William Marshall Bullitt and the law firm of Bruce & Bullitt, now Bullitt, Dawson & Tarrant, was representing the Minnesota Mutual Life Insurance Company, and the Massachusetts Mutual Life Insurance Company, and that they had been representing them during the entire time that they had been employed by her, and that they had advised the two Insurance Com-

panies not to pay her the insurance, so that they could create a law suit and get two more law fees, and force her to sell her partnership interest. They knew that there was no one named as beneficiary on any of the Life Insurance policies except Mrs. O'Brien-Smith, and that the beneficiary had never been changed on any of the policies. The Insurance Companies said that they had never heard of the so-called Insurance Trust Agreement. Further, Mrs. O'Brien-Smith learned that they had drawn-up interpleaders on behalf of the two Insurance Companies to pay the money into the United States District Court at Louisville. William Marshall Bullitt then told Mrs. O'Brien-Smith that she would have to employ other counsel to represent her on the insurance and to file the answers for her to their interpleaders.

Since none of the members of the law firm of Bruce & Bullitt represented Mrs. O'Brien-Smith in collecting her insurance due her as beneficiary under the policies, and since both they and the Joint Administrators contend in their complaint and their so-called final settlement of the O'Brien estate, which is their Exhibit No. 1, thereto, that Mrs. O'Brien-Smith had other counselors and advisers, and that she sold the partnership interest, then why were they paid Twenty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($23,333.33) on February 11, 1936, by the Joint Administrators.

About May 1, 1935, Mrs. O'Brien-Smith then employed Edward P. Humphrey to collect the insurance due her as beneficiary under the policies and to prepare the answers to the interpleaders that the Bruce & Bullitt law firm had drawn up in behalf of two of the Insurance Companies, namely: the Minnesota Mutual Life Insurance Company, and the Massachusetts Mutual Life Insurance Company.

B. The Joint Administrators Violated Their Statutory Duties By Failing To File The Final Settlement Of The Estate Of John A. O'Brien On March 1, 1936, In The Jefferson County Court.

1. The Joint Administrators under the provisions of the Kentucky Statutes K.S. 3858 which is now K.R.S. 25.175 et seq., and the Law in the State of Kentucky, were due to file a final settlement of the estate of John A. O'Brien, on March 1, 1936, in the office of the Clerk of the Jefferson County Court, which would have been two years from the date they qualified as Joint Administrators of the said estate, to-wit on March 1, 1934. Further, Judge Mark Beauchamp, Judge of the Jefferson County Court, notified the Joint Administrators that the final settlement of the Estate of John A. O'Brien was due to be filed in the office of the Clerk of the Jefferson County Court on March 1, 1936 (Mrs. Smith's Exhibit No. 22 R. I—652a-653a). The said notice is as follows:

"#24146 Jefferson County Court
(1) Mark Beauchamp, County Judge

The Louisville Trust Company January 21, 1939
5th and Market Sts.,
Louisville, Ky.

Dear Sirs:—

On March 1st, 1934, You Were Appointed Co-Executor Estate John A. O'Brien, Deceased, In The Jefferson County Court. Under The Provisions Of The Law Your Settlement Was Due March 1st, 1936.

Please Take Up This Matter At Once With Any Of The Following Commissioners."

(The Judge listed six commissioners, their addresses and telephone numbers.)

The Joint Administrators failed and refused to file the final settlement of the O'Brien estate and did not even file

a partial settlement of said estate in the Jefferson County Court until June 21, 1950, even though the Court of Appeals of Kentucky had also ordered the Joint Administrators four times in four separate opinions rendered in favor of Mrs. Patricia O'Brien-Smith, to file a final settlement of the O'Brien Estate in the Jefferson County Court and not in the Jefferson Circuit Court.

Judge Horace M. Barker, Judge of the Jefferson County Court, "Issued A Rule," against the Joint Administrators to file a final settlement of the Estate of John A. O'Brien in the Jefferson County Court on June 2, 1949, which was ten years later. The Joint Administrators still would not comply with the rulings of the Court and filed an appeal in the Jefferson Circuit Court from the "Rule Issued," against them in the Jefferson County Court, but they never prosecuted that Appeal, and the case laid dormant for several years, and was not finally disposed of until November 20, 1953, and October 1954.

2. **1936-1950**

Mrs. O'Brien-Smith Was Upheld By Four Opinions Of The Court Of Appeals Of Kentucky In Her Opposition To The Joint Administrators Settling Their Accounts Of The Estate Of John A. O'Brien In The Jefferson Circuit Court.

The Joint Administrators have contended that "Mrs. Smith" obstructed their filing a final settlement of the John A. O'Brien estate in the Jefferson County Court at Louisville, Kentucky, but they have not filed or offered any proof in the within action to prove their contentions.

From February 11, 1936, to February 6, 1937, Mrs. Smith did not see or have any correspondence or conferences with anyone representing the Joint Administrators.

On February 6, 1937, Mrs. Smith wrote a letter to the Joint Administrators requesting them to file suit for Rescission of the Contract of Sale of her Partnership Interest in the Edward J. O'Brien Tobacco Company, and its four subsidiaries which they sold some time in 1935, and requested them to set a date for a conference with her and her counsel Judge Edward C. O'Rear of Frankfort, Kentucky. (Mrs. Smith's Exhibit No. 24, R. I—658a-663a.)

The Joint Administrators refused to have a conference with Mrs. Smith, and her attorney Judge Edward C. O'Rear. The Joint Administrators refused to file suit for the Rescission of the Contract of Sale of Mrs. Smith's Partnership Interest in the Edward J. O'Brien Tobacco Company, and its four subsidiaries.

In the request of Mrs. Smith to the Joint Administrators to file suit for rescission of the sale of the partnership interest, she offered to pay into Court the entire amount that she had received for the sale of the said partnership interest, and restore the parties to status quo.

On February 18, 1937, after the Joint Administrators were already in default one year of their statutory duties, they by-passed the Jefferson County Court and filed their first trumped-up settlement suit of the Estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, No. 250-301, consisting of three (3) typewritten pages and filed therewith a copy of the last will of John A. O'Brien dated September 22, 1933, and a copy of a purported will of John A. O'Brien dated July 7, 1933, marked Exhibit "B," and a copy of the Order of Appointment of the two Trust Companies as Joint Administrators with the will annexed of the estate of John A. O'Brien marked as their "Exhibit A", (see Mrs. Smith's Exhibit No. 23, R. I—654a-657a).

On February 18, 1937, the Joint Administrators had only to file their final settlement of the O'Brien Estate in the

Jefferson County Court, and simply retain the six thousand ($6,000.00) dollars for bequests in Mr. O'Brien's so-called first will of July 7, 1933, if they had really thought that the two bequests therein of the one thousand ($1,000.00) dollars and the five thousand ($5,000.00) dollars were bona fide bequests, but they knew they were not. They knew then that Mrs. Smith was the sole beneficiary of John A. O'Brien's last will and of his entire Estate, as held by an opinion of the Court of Appeals of Kentucky. No steps were taken in their first settlement suit until September 22, 1944.

In May, 1945, before Mrs. Smith filed an answer to the trumped-up first settlement suit of the Trust Companies, she filed a Special and General Demurrer. Judge Gilbert Burnett, the trial Judge, overruled both. Mrs. Smith then filed a Writ of Prohibition in the Court of Appeals of Kentucky, pointing out the defects of the Petition and that it did not comply with Section 429 of the Civil Code. The Court of Appeals of Kentucky denied the Writ and held that Mrs. Smith had her remedy by Appeal after trial.

Trial was had and she got that remedy six (6) years later, on June 8, 1948, and May 16, 1950. So there was merit to her every contention from the beginning to the present day, as we have proved. That was six (6) years of long tiresome harassing, expensive litigation, all of which was paid for out of Mrs. Smith's own funds.

Bear in mind that the Joint Administrators were one year in default of their statutory duties before they filed their first trumped-up settlement suit, and that the Court of Appeals has rendered two Opinions in favor of Mrs. Smith, in the first settlement suit, which held that the Joint Administrators' Petition did not state a cause of action under Section 429 of the Civil Code, to settle the Estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, nor did the Joint Administrators' Amended Petition filed

therein in the Jefferson Circuit Court on November 30, 1948. So, if there was no Petition to sustain a cause of action, then there was no Petition to sustain the stay of proceedings requested by Mrs. Smith. The joint Administrators' attorney, William Marshall Bullitt, admitted and stated in an argument in open Court before four (4) of the Judges of the Court of Appeals of Kentucky, on October 3, 1950, that the Joint Administrators had blundered in the filing of the settlement suits of the O'Brien Estate in the Jefferson Circuit Court, and that they had made a grievous mistake, but he only admitted that they held up the settlement of the O'Brien Estate from September, 1944, until June 21, 1950; but the truth is the Joint Administrators have held up the settlement of the Estate from March 1, 1936, until the present day.

Mrs. Smith won the settlement suit by two favorable decisions in the Court of Appeals of Kentucky, rendered on both the first and second appeals, on June 8, 1948, and May 16, 1950. See the cases of Patricia R. Smith v. The Louisville Trust Company and Citizens Fidelity Bank and Trust Company, 308 Ky. 189, 213 S.W. (2d) 987 (June 8, 1948). Petition for Rehearing Denied October 29, 1948. The First Opinion held:

> "In the instant case Mrs. Smith filed a special and a general demurrer to the petition. The special demurrer was based on the allegation that the Court had no jurisdiction of the subject matter of the action. The general demurrer was based on the allegation that the petition does not state facts sufficient to constitute a cause of action against the defendant (appellant), or for the settlement of the estate of John A. O'Brien, deceased."
>
> "It will be noted that the petition in this case does not follow the requirements of Section 429, supra, in that it does not state the amount of the debts, if any, the

nature or value of the property, real or personal, of the decedent; neither does it aver that the personal estate is insufficient for the payment of all or any debts."

"The petition further alleged that the plaintiffs had caused all estate and inheritance taxes, 'except certain disputed and undetermined portions thereof,' and all debts of the estate to be paid, and that they had collected all income arising therefrom, and had kept an account of all receipts and disbursements, and that the plaintiffs at the time of the filing of the petition were ready to make final settlement of the estate."

"It is obvious that the allegations of the petition fall short of the requirements of an action to give a circuit court jurisdiction of a case for the settlement of an estate. It is equally obvious from the averments of the petition that the estate had been settled, except the payment of the specific bequests to the College of Arts and Sciences of Georgetown University and the Bishop of the Roman Catholic Diocese of Louisville; and since no contention was made in respect to the payment of these bequests, the Administrators had only to file their settlement with the Judge of the Jefferson County Court. It is apparent that the Jefferson Circuit Court should have sustained the general demurrer to the petition, because it did not state a cause of action for the settlement of an estate.

The Judgment is reversed."

In the Second Appeal filed by the Joint Administrators in their first settlement suit, the Court of Appeals of Kentucky ruled in favor of Mrs. Smith in the same case of The Louisville Trust Company and Citizens Fidelity Bank and Trust Company v. Smith, 313 Ky. 15, 230 S.W. (2d) 64 (May 16, 1950). This case held:

"We only ask, where would we be going, if, in the settlement of estates properly to be made in the county court, we should follow a rule for administrators to

submit a proposed settlement to those interested, and merely because of disapproval thereof, permit action to be brought in circuit court. It is the duty of the administrator to settle. One of the purposes of settlement in the county court is to give the parties interested an opportunity to file objections seasonably and properly. There is no reason why an exception should prevail in Jefferson County. This matter has been unreasonably prolonged. The settlement should be made as per the opinion in the former appeal.

The judgment is affirmed."

After the Joint Administrators refused to file suit for rescission of the sale of the partnership interest, on March 10, 1937, Judge Edward C. O'Rear of Frankfort, Kentucky, representing Mrs. Smith, filed suit for the Rescission of said Contract of Sale of Mrs. Smith's Partnership Interest in Edward J. O'Brien Company and its four subsidiaries, in the Jefferson Circuit Court Chancery Branch, First Division, No. 250-536.

In the first Petition filed in the "Rescission Suit", the Joint Administrators were named with the O'Brien brothers as defendants, and the suit was against them in their individual capacities. In March, 1938, the Judge of the Jefferson Circuit Court ruled that "the Petition For The Rescission of The Contract Of Sale must be reformed and not amended", whereupon the order was complied with, and when Mrs. Smith filed the Reformed Petition on April 11, 1938, in the Jefferson Circuit Court in the Rescission Suit, the Joint Administrators were only named as "NOMINAL PARTIES DEFENDANT", so that Mrs. Smith could maintain the action in her own name, since the Joint Administrators had refused to file suit for Rescission Of The Contract of the sale of the Partnership Interest. In the Rescission Suit, no relief was sought or asked for against the Joint Administrators in the prayer of the Peti-

tion, and no Proof Was Introduced Against Them. Yet, the Joint Administrators bitterly opposed the Rescission of the Contract for Sale of the Partnership Interest, and filed stronger briefs in the Rescission suit against the estate of John A. O'Brien, and against Mrs. Smith, than the attorneys did for the defendants O'Briens. All of the expenses and briefs which the Joint Administrators had printed and filed against the estate and Mrs. Smith in the rescission suit, were paid for out of the cash belonging to Mrs. Smith which has been in their possession since February 11, 1936, which the District Court approved by his order and Summary Judgments filed and entered on November 9, 1962, in the within action, yet in his opinion he held that he had no jurisdiction of probate matters.

It was not necessary for the Trust Companies to employ two separate law firms to represent them against the O'Brien estate, and the sole beneficiary, Patricia O'Brien-Smith.

The final opinion rendered in the rescission suit, held that Mrs. Smith's counselors and advisors could have ascertained what the market value was of her Partnership interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries, and that it was not the duty of the O'Brien Brothers to disclose to her the market value of her said interest and the amount of her profits for the year of 1935.

Mrs. Smith's counselors and advisors were the Joint Administrators, and William Marshall Bullitt, her attorney and their attorney, who owned over fifty one (51%) per cent of The Citizens Fidelity Bank & Trust Company, and who was paid twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33) on February 11, 1936, to settle the O'Brien Estate, which he refused to do after he was paid.

It is contended by the Joint Administrators that Mrs. Smith delayed the settlement of the John A. O'Brien Estate from March, 1937, until September, 1944, because she filed a Motion in March, 1937, for a stay of proceedings in the Joint Administrators first trumped-up settlement suit in the Jefferson Circuit Court, until the merits of the Petition for rescission of the sale of the partnership interest would be ruled upon. The Court of Appeals of Kentucky ruled that there was no petition to sustain a cause of action in the Joint Administrators first Settlement Suit. So the delay was caused only by the Joint Administrators.

Mrs. Smith lost the Rescission Suit, finally in May, 1944. The Joint Administrators re-opened their first settlement suit in September, 1944, and lost it on June 8, 1948, after two Appeals and Petitions for rehearing were overruled on May 16, 1950, supra.

3. **1949-1954**

All The Records In The Estate Of John A. O'Brien From The Office Of The Clerk Of The Jefferson County Court, Were Missing Which Were Taken By The Joint Administrators To The Jefferson Circuit Court On The Joint Administrators' Appeal From The "Rule Issued" Against Them By The Judge Of The Jefferson County Court, To File The Final Settlement Of The Estate Of John A. O'Brien On June 2, 1949.

On February 24, 1949, counsel for Mrs. Smith filed a "Motion for Rule", in the Jefferson County Court, against The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, who are the Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, to show cause why they should not file a final settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court. (Mrs. Smith's Exhibit No. 32, R. I—713a-715a.)

Honorable Horace M. Barker, the then presiding Judge of the Jefferson County Court, sustained the "Motion for Rule", and it was returnable on March 1, 1949, and issued a summons and same was executed on E. P. Muir, Vice-President of The Louisville Trust Company, and L. L. Daugherty, Vice-President of the Citizens Fidelity Bank and Trust Company. (Exhibit No. 32, R. I—715a-717a.)

Without notice to Mrs. Smith or her counsel, the Trust Companies' Joint Administrators counsel, Irvin Marcus, of Davis, Boehl, Viser & Marcus, and R. Lee Blackwell, of Bullitt, Dawson & Tarrant, obtained an extension of time to March 21, 1949, in which to answer the Rule Issued against them requiring the filing of a Final Settlement of the O'Brien Estate, and an Order was entered on February 28, 1949. (Exhibit No. 32, R. I—718a-719a.)

The sixty (60) days allowed by the Jefferson Circuit Court in which to file an appeal from the Final Order and Judgment of the Jefferson Circuit Court of December 15, 1948, (filed in the first settlement suit) which was in conformity with the Court of Appeals' Opinion Supra, overruling the Motion of the Joint Administrators, to file an amended Petition in their first trumped-up settlement suit, had already elapsed by February 24, 1949.

4. March 18, 1949—April 17, 1951

Joint Administrators Second Settlement Suit Of The Estate Of John A. O'Brien In The Jefferson Circuit Court And The Court Of Appeals Of Kentucky Granted Mrs. Smith A Permanent Injunction Against The Joint Administrators Enjoining Them From Prosecuting Their Second Settlement Suit Of The Estate Of John A. O'Brien, In The Jefferson Circuit Court.

During the extension of time which the Joint Administrators obtained from the Jefferson County Court to

answer the Rule Issued against them, they sought and were granted from the Clerk of the Court of Appeals of Kentucky, on March 18, 1949, the right of a second Appeal in their first trumped-up settlement suit in the Court of Appeals of Kentucky.

On March 21, 1949, three days later, the Joint Administrators obtained from the Jefferson County Court a second extension of time in which to answer the "Rule Issued" against them, and on March 31, 1949, filed a second trumped-up settlement suit of the Estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, No. 313-655, with a fifty-three (53) page Printed Petition. (Exhibit No. 32, R. I—718a-719a.)

On April 1, 1949, the Joint Administrators filed in the Jefferson County Court their "Response to Rule", issued against them on February 24, 1949, and in the said Response they contended, as grounds for not complying with the "Rule Issued" and for not filing a final settlement of the O'Brien estate in the Jefferson County Court, that they now had pending in the Jefferson Circuit Court, a second settlement suit of the Estate of John A. O'Brien, deceased, No. 315-655. (Exhibit No. 32, R. I—719a-722a.)

On April 6, 1949, the Joint Administrators filed a "Memorandum In Support Of Their Response To Rule", in the Jefferson County Court, and gave as further grounds for not filing a final settlement of the O'Brien Estate in the Jefferson County Court,

(1) That they had a Second Appeal pending in their first Settlement Suit, filed on March 18, 1949,

(2) That on March 31, 1949, that the Joint Administrators had filed a Second Settlement Suit in the Jefferson Circuit Court, and they filed a copy of their Second Appeal

in their First Settlement Suit. (Exhibit No. 32, R. I—722a-734a.)

On April 6, 1949, counsel for Patricia R. Smith filed a "Reply To Response Of Trust Companys To Motion For Rule Against Them To Settle The Accounts Of The Estate of John A. O'Brien." (Exhibit No. 32, R. I—735a-752a.)

On April 6, 1949, counsel for Mrs. Smith also filed a Motion in The Jefferson County Court that the Joint Administrators be required to invest the Forty Thousand Dollars ($40,000.00) cash, belonging to the O'Brien Estate, of which Mrs. Smith is the sole beneficiary, on which they had been holding since June, 1946, on which they had not accounted to the O'Brien estate or Mrs. Smith for any interest thereon, and the Twenty-Five Thousand Dollars ($25,000.00) cash belonging to the O'Brien Estate and Mrs. Smith, which the Joint Administrators had been holding since February 11, 1936, on which they had not accounted to the O'Brien Estate or Mrs. Smith for any interest. (Exhibit No. 32, R. I—753a-755a.)

On April 14, 1949, Mrs. Smith filed a reply to Trust Company, Co-Administrators' Memorandum, in support of their response to Motion for Rule against them to settle, the Estate of John A. O'Brien, deceased. (Exhibit No. 32, R. I —755a-769a.)

On April 22, 1949 Mrs. Smith filed a memorandum with five exhibits in support of Motion to Require Trust Com-

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Mrs. O'Brien-Smith's Exhibits No. 32 and 33, are certified copies of the Transcript of Record from the Jefferson County Court No. 24,146 in the Estate of John A. O'Brien, deceased, from January 24, 1934 through October 1, 1951, and consists of pages 678a through 1092a, of Volume 1, Printed Transcript of Record, which were filed in the within action by order of the District Court on August 28, 1959. The Transcript of Record references will be referred to as above referred in the remainder of this Petition For Writ of Certiorari.

panies to invest Forty Thousand Dollars ($40,000.00). (Exhibit No. 32, R. I—770a-858a.)

"Exhibit No. 1—Notice and Motion (filed in the Court of Appeals) Motion to Set Aside Granting of Appeal by Clerk of The Court of Appeals to The Louisville Trust Company and The Citizens Fidelity Bank and Trust Company, Co-Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, and Motion to Dismiss the Appeal in the Above Styled Case and Quash Summons Thereon."

"Exhibit No. 2—Notice and Motion (filed in the Court of Appeals on April 20, 1949) to Quash the Return on the Summons Attempted to Be Served on Defendant, Patricia R. Smith, On April 1, 1949."

"Exhibit No. 3—Affidavit in Support of Motion to Quash Summons of Patricia R. Smith, Defendant herein, by Walter B. Smith, Filed and Entered."

"Exhibit No. 4—Affidavit in Support of Motion to Quash the Return on and the Summons Attempted to be Served on Defendant, Patricia R. Smith, on April 1, 1949, by Howard Tribble. Filed and Entered."

"Exhibit No. 5—Certified Copy of Transcript of Record from Jefferson Circuit Court on Co-Administrators Second Appeal, to Court of Appeals in their First Settlement Suit No. 250-301, in Jefferson Circuit Court, Consisting of Thirty-Three (33) Pages. Filed in Court of Appeals, April 11, 1949. Filed and Entered."

On April 22, 1949, the Joint Administrators filed a Response to Motion to require them to invest cash in the Estate of John A. O'Brien, deceased, and they gave no reason for not investing the cash held by them since 1936, belonging to Mrs. Smith. (Exhibit No. 32 R. I—860a-862a.)

On April 25, 1949, counsel for Mrs. Smith filed a Petition for a Permanent Injunction in the Jefferson Circuit

Court, No. 313-986, to enjoin the Trust Companies from prosecuting their Second Trumped-Up Settlement Suit of the Estate of John A. O'Brien, deceased, which they filed on March 31, 1949. (Exhibit No. 32, R. I—853a-858a.)

Said Petition was dismissed, and counsel for Mrs. Smith filed an appeal to the Court of Appeals of Kentucky on May 20, 1949, (which she won on March 6, 1951) and made a Motion for a Temporary Injunction until the Petition for a Permanent Injunction would be ruled upon. Said Motion was sustained, Mandate issued and Order entered. Mrs. Smith won that appeal on March 6, 1951, the Court of Appeals of Kentucky granted her a permanent Injunction against the Joint Administrators from ever filing another Settlement Suit in the Estate of John A. O'Brien, in the Jefferson Circuit Courts. See *Patricia R. Smith* v. *The Louisville Trust Company and Citizens Fidelity Bank and Trust Company*, 237 S.W. (2d) 836, (March 6, 1951), Rehearing denied April 17, 1951. In that case it held:

> "Suit by Patricia R. Smith to enjoin the Louisville Trust Company, and others, coadministrators of John A. O'Brien, deceased, from further prosecuting a second so-called settlement suit in the Jefferson Circuit Court. The Circuit Court, Chancery Branch, Second Division, Jefferson County, W. Scott Miller, J., dismissed plaintiff's petition and overruled her motion for reconsideration of the petition, and plaintiff appealed. *The Court of Appeals, Van Sant, C., held that the matter had been unreasonably prolonged and that since two former opinions of the Court of Appeals had directed the coadministrators to make final settlement in the County Court, the court below should have permanently enjoined the further prosecution of the second settlement suit.*
>
> Reversed with directions."
>
> "Upon return of the above case to the circuit court, the co-administrators tendered an amended petition.

Objection being entered thereto the court refused permission to file same but permitted the tendered amendment to be made a part of the record. The co-administrators then appealed to this court."

"Soon *thereafter and while this second appeal was pending, this second action was filed in the Jefferson Circuit Court* seeking a settlement of the estate of John A. O'Brien, deceased. In the second appeal above the judgment was afterwards affirmed. Louisville Trust Co. v. Smith, 313 Ky. 15, 230 S.W. 2d 64." (1950)

"(1) It appears to be the position of the co-administrators that as long as there remain disputed questions they are entitled to bring action in the circuit court for the settlement of the estate. The more fact that there are disputed matters and possibly questions that should be litigated, is not qualification for a settlement suit in the circuit court. One of the basic requirements for such suit is that there be not sufficient personal estate for payment of the debts."

"It will be noted that this second attempted settlement suit was filed while the second appeal in the first action above was in the process of appeal. The averments of the first action failed to meet the requirements of 429 of Civil Code of Practice. The tendered amendment, which was the subject of the second appeal, also failed in this respect. *There could be no possible end to litigation should a party be permitted to file a series of attempted settlement suits.*"

"Since this matter has been before us, another case has come and gone which had to do with the filing of a settlement of this estate in the county court, in which appellees claimed to have made a purported final settlement, subject to a few questions yet to be determined. *Again we say this matter has been unreasonably prolonged.*"

"*The way has been opened and is now open for the final settlement in county court.* Under two former opinions of this court appellees have been directed to

make final settlement in the county court. Further unnecessary delay will be inexcusable."[2]

"(2) The court below should have permanently enjoined the further prosecution of this second settlement suit."

"The judgment is reversed for entry of judgment consistent herewith."

On May 5, 1949, Honorable Horace M. Barker, Judge of the Jefferson County Court, after considering the Trust Companies' delaying tactics for not filing a final settlement of the O'Brien Estate, rendered an Opinion and made the "Rule Issued" against the Joint Administrators absolute, and ordered and directed them to file a final settlement of the Estate of John A. O'Brien, deceased, in Jefferson County Court within sixty (60) days thereafter. (Exhibit No. 32, R. I—870a-872a).

On May 19, 1949, counsel for Mrs. Smith filed a motion for reconsideration of the time given the Joint Administrators to file the said final settlement of the O'Brien Estate in Jefferson County Court and arguments were had thereon by both counsel for the Joint Administrators and counsel for Mrs. Smith. (Exhibit No. 32, R. I—872a-878a).

On May 19, 1949, the Joint Administrators filed a "Response To motion (of Mrs. Smith") (Filed on May 19, 1949), and again the Joint Administrators argued as an excuse for not filing a final settlement of the O'Brien Estate that they had a second settlement suit pending in the Jefferson Circuit Court, and they filed a copy of their fifty-three (53) page printed Petition, filed in Jefferson Circuit Court on March 31, 1949, as an Exhibit, with a copy of their thirty-eight (38) page Receipts and Disbursements that was filed with said Petition, in Jefferson Circuit Court

on March 31, 1949, and *they wrote a brief stating that as long as their Second Appeal was pending on the first settlement suit, and the second settlement suit was pending in the Jefferson Circuit Court, any steps taken in the Jefferson County Court would be void.* (Exhibit No. 32, R. I—879a-929a).

Arguments were had thereon by both counsel for Mrs. Smith and counsel for the Joint Administrators.

The Motion of Mrs. Smith was sustained and the time in which the Joint Administrators was given to answer the "Rule Issued" against them, was reduced thirty (30) days, and they were ordered to answer on June 5, 1949, and an Order was entered by the Honorable Franklin Fitch, Judge Pro Tem. (Exhibit No. 32, R. I—930a).

On May 26, 1949, the Joint Administrators filed an appeal from the "Rule Issued" against them and from the two Orders of the Jefferson County Court to the Jefferson Circuit Court, and issued a supersedeas on the Honorable Horace M. Barker, Judge of the Jefferson County Court, staying all proceedings in the final settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court, which further ordered the Clerk of the Jefferson County Court, to bring to the Clerk of the Jefferson Circuit Court on their appeal, all of the original records and papers in the John A. O'Brien Estate, which were in the Office of the Clerk of the Jefferson County Court. (Exhibit No. 32 R. I—931a-932a). Thus preventing a final settlement in County Court until said records were returned—they were never returned, they were lost or stolen and they were not legally restored until October 1954, by the ruling and an opinion of the Court of Appeals of Kentucky.

5. 1950-1952

The Joint Administrators Exparte Proceedings In The Jefferson County Court On Their Purported Final Settlement Of The Accounts Of The Estate Of John A. O'Brien.

On June 21, 1950, the Citizens Fidelity Bank and Trust Company, and The Louisville Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, filed a thirty-seven (37) page printed Petition for the settlement of and a partial settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court, and asked therein for a money Judgment against Patricia O'Brien-Smith, and further sought therein six other claims for four (4) law firms and the two Joint Administrators, and without specifying the amounts and without filing claims for said fees, and affidavits in support thereof, as required by law. Said Petition was entitled. "Their Account and Final Settlement of the Execution of Their Trust." Said Petition was signed by Irvin Marcus, and Davis, Boehl, Viser and Marcus, counsel for The Louisville Trust Company; and William Marshall Bullitt, R. L. Blackwell and Bullitt, Dawson & Tarrant, counsel for Citizens Fidelity Bank and Trust Company. Said Petition was verified by L. L. Daugherty, Vice-President of the Citizens Fidelity Bank and Trust Company, one of the Joint Administrators, but the said Petition was not verified by any officer for The Louisville Trust Company, the other Joint Administrator, as required by law in the final settlement of an estate in Kentucky. (R. I—46a-98a).

Filed with said Petition of the Joint Administrators was two Exhibits namely: Exhibit "A," which consists of forty-one (41) typewritten legal size pages which has no title, but upon examination discloses that it is a purported statement of accounts of receipts and disbursements of the

estate of John A. O'Brien, deceased, from the day of the Joint Administrators were appointed, on March 1, 1934, to June 1, 1950. Said Exhibit was not signed or verified by any officer of either Trust Company, or any attorney on behalf of either Trust Company, as required by law. (Mrs. Smith's Exhibit No. "D," R. I—233a-306a).

Also attached to said Petition of the Joint Administrators was an Exhibit "B" which consists of "Vouchers", consisting of over three hundred and twenty-six (326) pages, and vouchers. (This was not copied or filed in the within action because it would have been too costly.)

No summons was, or has ever been served upon Patricia O'Brien-Smith, and she did not learn that such Petition, or Exhibits had been filed in the Jefferson County Court until June 29, 1950.

On July 1, 1950, Mrs. Smith filed in the Jefferson County Court, a "Motion for Extension of Time to File Exceptions and Answer", or plead therein by Patricia O'Brien-Smith, the sole beneficiary of the estate of John A. O'Brien, deceased, notice of which was duly served on William Marshall Bullitt, of Bullitt, Dawson & Tarrant, and Irvin Marcus, of Davis, Boehl, Viser & Marcus, counsel for the Joint Administrators. Filed with said Notice and Motion was two affidavits of Walter B. Smith in support thereof, additional grounds for said Motion, a copy of the mandate and the Opinion of the Court of Appeals of Kentucky by Commissioner Morris, rendered on May 16, 1950, in favor of Patricia OBrien-Smith, Supra, (Exhibit No. 33, R. I—946a-960a).

The Opinion of the Court of Appeals of Kentucky of May 16, 1950, affirming the Jefferson Circuit Court's Order and Judgment of December 15, 1948, which was in favor of Mrs. Smith, wherein the Jefferson Circuit Court overruled the

Motion of the Joint Administrators to file an amended Petition in their first trumped-up settlement suit of the Estate of John A. O'Brien, deceased, filed in Jefferson Circuit Court on February 18, 1937, which Mrs. Smith *had already won on the first Appeal to the Court of Appeals of Kentucky* on June 8, 1948, a copy of said opinion and mandate was filed in the Jefferson County Court. (Exhibit No. 33, R. I—961a-965a).

Arguments were had by counsel for both Mrs. Smith and the Joint Administrators before County Judge Boman L. Shamburger, and the Motion for an extension of time was sustained, and an Order was entered on July 3, 1950, extending the time to August 7, 1950, (R. I—965a-966a).

After examination of the Joint Administrators' Petition and Exhibits "A" and "B", filed therewith, it was apparent that it was not and is not, a final settlement of the Estate of John A. O'Brien, deceased, as required by law and that it is only a partial settlement of the said estate, and that in the Petition and Prayer of said Petition, the Joint Administrators sought to recover from Mrs. Smith a money Judgment, without specifying what amount they sought to recover from her, or on what basis they made such a claim. Since it was not a final settlement of the John A. O'Brien Estate by law, Mrs. Smith was not required to answer or plead therein, in the Jefferson County Court.

Further, any steps which were taken, or would have been taken by Mrs. Smith in the Jefferson County Court pertaining to the settlement of the estate of John A. O'Brien, deceased, between May 26, 1949, and October, 1954, would have been void ab initio.

On August 7, 1950, Mrs. Smith filed her Objections and we quote:

"(1) Objection Of Patricia R. Smith (Sole Beneficiary Of The Estate Of John A. O'Brien, Deceased), To This Court, Or Any Commissioner, Confirming, or Approving, Or Hearing Any Proof On Any Item Contained In The Periodical, Or Partial Settlement Of The Estate Of John A. O'Brien, Deceased, Filed Herein, On June 21, 1950, By The Louisville Trust Company, And The Citizens Fidelity Bank and Trust Company, Co-Administrators, With The Will Annexed Of The Estate Of John A. O'Brien, Deceased, And Called, 'Their Account And Final Settlement Of The Execution Of Their Trust'.

"(2) Motion To Require The Co-Administrators Of The Estate Of John A. O'Brien, Deceased, To File A Final Settlement Of The Estate Of John A. O'Brien, Deceased, In Compliance With The Kentucky Revised Statutes And Rulings Of The Court Of Appeals On The Settlement Of This Estate, And That Both Of The Co-Administrators Be Required To Sign A Sworn Affidavit Thereto.

"(3) Motion That Time Be Extended for the Filing Of Exceptions And Objections And Answer, Until The Co-Administrators File A Final Settlement Of The Estate Of John A. O'Brien, Deceased, And Sign An Affidavit Thereto, And Until The Co-Administrators Are Required To Dismiss The Second 'Trumped-Up' Settlement Suit Now Pending In The Jefferson Circuit Court, And Their Appeal From The Order Of The Jefferson County Court Now Pending In The Jefferson Circuit Court." (Exhibit No. 33, R. I—967a-975a).

As will be noted from the above heading, Mrs. Smith did not file a Motion for a further extension of time in which to file exceptions, objections and answer to the Joint Administrators partial settlement of accounts. Nor did she ever at any time state, or call what the Joint Administrators have filed, a final settlement of the Estate of John A. O'Brien, deceased, but by the pleading she filed on August 7, 1950,

it will be noted it was an objection to the Jefferson County Court, the Judge, or any commissioner who may be appointed, ever considering the partial settlement filed by the Joint Administrators, being a final settlement of the O'Brien Estate, and Mrs. Smith filed a Motion that the Judge of the Jefferson County Court require the Joint Administrators of the Estate of John A. O'Brien, deceased, to file a final settlement of the estate of John A. O'Brien, deceased, in compliance with the Kentucky Revised Statutes and Rulings of the Court of Appeals of Kentucky, on the settlement of the O'Brien Estate, and that both of the Joint Administrators be required to file a sworn affidavit thereto, as required by Kentucky law.

Mrs. Smith further filed a "Motion That Time Be Extended for the Filing of Exceptions, Objections and Answer, until the Co-Administrators would file a Final Settlement of the Estate of John A. O'Brien, Deceased, and Until They Would File an Affidavit Thereto, and Until the Co-Administrators Are Required to Dismiss Their Second Trumped-up Settlement Suit of the O'Brien Estate Now Pending in the Jefferson Circuit Court, and the Co-Administrators' Appeal from the Orders of the Jefferson County Court of May 5 and 19, 1949, now pending in the Jefferson Circuit Court", and cited the following cases to uphold her contention: *Deming* v. *Paynter*, 42 S.W. 1112; *Andrews* v. *McCarty*, 208 Ky. 25, 270 S.W. 466. (Exhibit No. 33, R. I—967a-975a).

Mrs. Smith did not get another extension of time on August 7, 1950, as stated by the Joint Administrators. There was no hearing had on the above objections and Motions on August 7, 1950. The hearing was passed to August 22, 1950, by an Order entered by Thomas Young trial commissioner.

On August 22, 1950, a hearing was had before County Judge Boman L. Shamburger, on the objections and mo-

tions filed on August 7, 1950, and on August 22, 1950, Mrs. Smith filed a "Notice and Motion to Strike from the record of the O'Brien estate, the purported final settlement of the estate of John A. O'Brien, deceased, consisting of a thirty-seven (37) page historical brief or petition, which contained many unfounded and unwarranted statements. It did not comply with the Kentucky Revised Statutes for a final settlement of an estate in County Court, and it is prejudicial to the substantial rights of the sole beneficiary, Patricia R. Smith" and in the first paragraph of that Motion it specifically states that, "*Said Motion was made without entering her appearance herein and that she specially moves the Court to strike from the record of this Estate the so-called final settlement* of this estate and filed with the co-administrators purported final settlement of the estate of John A. O'Brien, deceased, filed in this Court (Jefferson County Court) on June 21, 1950, the co-administrators thirty-seven (37) page historical brief or petition." (Exhibit No. 33, R. I—977a-982a).

Arguments were had by both counsel for Mrs. Smith and counsel for the Joint Administrators, whereupon the Judge of the Jefferson County Court failed and refused to rule on said Motions, and referred the so-called settlement of the estate of John A. O'Brien, deceased, to A. Scott Hamilton, special commissioner, and entered an order to that effect. (Exhibit No. 33, R. I—983a-984a.)

On September 1, 1950, Mrs. Smith filed "Notice and Motion for Reconsideration of the Three (3) Motions and Objections Filed by Counsel for Patricia R. Smith on August 7, 1950, and her Notice and Motion To Strike filed on August 22, 1950, and Motion to Set Aside the Order Entered by This (Jefferson County) Court on August 22, 1950." Wherein said commissioner was appointed to hear and make recommendations in the partial settlement of the

Estate of John A. O'Brien, deceased. (Exhibit No. 33 R. I —985a-991a.)

Arguments were had thereon by both counsel for Mrs. Smith, and counsel for the Joint Administrators. The Judge of the Jefferson County Court did rule on September 8, 1950, and he overruled Mrs. Smith's objection to the partial settlement of the estate being considered a final settlement of the estate, and overruled Mrs. Smith's Motion to require the Joint Administrators to file a final settlement of the estate, and the Motion to strike, and entered three separate orders thereon on September 8, 1950. (Exhibit No. 33, R. I —991a-997a.)

6.

A Stay Of All Proceedings In The Settlement Of The Estate of John A. O'Brien, Deceased, Was Granted By The Court Of Appeals Of Kentucky From October 3, 1950, Until May 11, 1951.

On October 3, 1950, before any hearings were had before the appointed Commissioner, A. Scott Hamilton, on the Joint Administrators' partial settlement of the Estate of John A. O'Brien, deceased, Patricia O'Brien Smith filed a petition for a Writ of Mandamus in the Court of Appeals of Kentucky, against County Judge Boman L. Shamburger, requesting the Court of Appeals to command County Judge Boman L. Shamburger to require the Joint Administrators to file a proper final settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court, in compliance with the Kentucky Revised Statutes for the settlement of an estate in Kentucky, and in compliance with the Court of Appeals' two opinions and mandates on the John A. O'Brien Estate, supra.

The Order and Judgment of December 15, 1948, of the Jefferson Circuit Court, in conformity with said Opinion,

and in compliance with the Rule Issued and made absolute against the Joint Administrators, by Honorable Horace M. Barker, County Judge then presiding, and Honorable Franklin Fitch, Judge pro tem, of the Jefferson County Court, on May 5, 1949, and May 19, 1949.

On October 3, 1950, the Court of Appeals of Kentucky entered an Order sustaining the Motion for a Temporary Stay of all proceeding in the Jefferson County Court on the partial settlement of the O'Brien Estate until the merits of the Petition for a Writ of Mandamus would be ruled upon by the Court of Appeals.

On October 4, 1950, Mrs. Smith filed a Motion in the Jefferson County Court to File an Order of the Court of Appeals, Granting a Temporary Stay of All Proceedings in the Settlement of the Estate of John A. O'Brien, deceased. (Exhibit No. 33, R. I—998a-1002a.)

On January 26, 1951, the Court of Appeals of Kentucky overruled Patricia O'Brien Smith's Petition for Writ of Mandamus and rendered an Opinion. *Smith* v. *Shamburger, Judge*, 314 Ky. 850; January 26, 1951; Rehearing denied, May 11, 1951. The Opinion stated:

> "In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court; (1) A settlement suit filed April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former judge of Jefferson County Court, directing the Co-administrators to settle the estate. There has been no final disposition of either of these cases. If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement."

The opinion in effect held that as long as the Joint Administrators' Second settlement suit of the O'Brien estate, in the Jefferson Circuit Court was pending, as long as the Joint Administrators' appeal was pending in the Circuit Court from the "Rule Issued" against them to file the final settlement of the O'Brien Estate in County Court, that the accounting they had filed in the County Court on June 21, 1950, was not a final settlement of the O'Brien Estate.

7. The Opinion rendered on the Writ of Mandamus did not hold that the Joint Administrators had filed a proper final settlement of the Estate of John A. O'Brien, deceased, in Jefferson County Court, but in effect held that the Petition for Writ of Mandamus should have been filed in the Jefferson Circuit Court and was not properly before the Court of Appeals of Kentucky, and cited cases holding to this effect. (Exhibit No. 33, R. I—1002a-1009a.)

On February 26, 1951, counsel for Patricia O'Brien Smith filed in the Court of Appeals of Kentucky a Motion for an extension of time to file a Petition for Rehearing on the Opinion filed on January 26, 1951, on the Writ of Mandamus, and the said Motion was sustained and time for filing said Petition for a rehearing was extended to and including March 30, 1951.

On March 30, 1951, Patricia O'Brien-Smith filed a Petition for rehearing on the Opinion on the Writ of Mandamus.

On May 11, 1951, the Petition for rehearing on the Writ of Mandamus was overruled and Mandate issued on May 11, 1951.

So by the above stated history of the pleadings filed in the Court of Appeals of Kentucky from October 3, 1950, through May 11, 1951, it clearly shows that the proceedings on the partial settlement of the estate of John A. O'Brien,

deceased, were held in abeyance by the Order of the Court of Appeals of Kentucky of October 3, 1950.

Counsel for Mrs. Smith had learned that all of the original records and papers of the John A. O'Brien Estate brought to the Office of the Clerk of the Jefferson Circuit Court, on the Appeal filed thereon, on May 26, 1949, by the Joint Administrators were lost or stolen from the Clerk's office.

Immediately, upon discovering that the entire record of the O'Brien Estate was missing from the Office of the Clerk in the Jefferson Circuit Court, counsel for Patricia O'Brien-Smith filed in Jefferson County Court, on July 11, 1951, a "Motion that neither the Judge nor a Commissioner of this Court (Jefferson County Court) will hear proof for or against any item in the purported settlement of accounts of the Joint Administrators until thirty (30) days after the entire original record or a certified copy thereof of the O'Brien Estate is returned to the County Court." (Exhibit No. 33, R. I—1014a-1017a.)

On July 11, 1951, the Judge of the Jefferson County Court refused to rule on said Motion and referred same to A. Scott Hamilton, the appointed Commissioner. (Exhibit No. 33, R. I—1017a-1018a.)

On July 13, 1951, Patricia O'Brien-Smith filed a Petition for a Temporary Injunction in the Jefferson Circuit Court to enjoin the Jefferson County Court, Boman L. Shamburger, County Judge, and A. Scott Hamilton, Commissioner, from proceeding with hearings on the partial settlement of the Estate of John A. O'Brien, deceased, until thirty (30) days after the forty-one (41) original records and papers of the O'Brien Estate, or a certified copy of same were found and returned to the Jefferson County Court. A Temporary Restraining Order was granted by

the Judge of the Jefferson Circuit Court, and summons was served on July 12, 1951, on the Jefferson County Court, Boman L. Shamburger, County Judge, and A. Scott Hamilton, Commissioner, with a Notice of Judge Speckman's Temporary Restraining Order. There was filed in the Jefferson County Court, on July 13, 1951, a carbon copy of the Petition for a Temporary Injunction which had been filed in the Jefferson Circuit Court, No. 329,007, a carbon copy of the affidavit attached thereto, a carbon copy of Judge Speckman's Temporary Restraining Order, and a carbon copy of the Order pertaining to the restoration of the lost or stolen records wherein Commissioner John O. Arnold of the Jefferson Circuit Court was appointed for the purpose of replacing and supplying authentic and certified copies of all of the forty-one (41) original records and papers of the O'Brien Estate, listed in the Office of the Clerk of the Jefferson Circuit Court, in Rule Docket Book #315, Case No. 314,574 (the Trust Companies' Appeal from the "Rule Issued" against them), and on pages 19 and 20 of said Book. (Exhibit No. 33, R. I—1018a-1038a.)

On July 23, 1951, Honorable Lawrence F. Speckman of the Jefferson Circuit Court overruled the Motion and Petition for a Temporary Injunction of Patricia O'Brien-Smith and entered an Order to that effect.

On July 26, 1951, counsel for Patricia O'Brien-Smith filed a Motion for a Temporary Injunction in the Court of Appeals of Kentucky for a Stay of all proceedings on the partial settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court, until thirty (30) days after authentic and certified copies of the forty-one (41) original records of the O'Brien Estate were restored and filed in the Jefferson County Court, from where they were removed by the Joint Administrators on May 26, 1949.

The Court of Appeals of Kentucky granted a Temporary Stay of all proceedings in the Jefferson County Court on the partial settlement of the Estate of John A. O'Brien, deceased, until the merits of the Petition for Temporary Injunction should be ruled upon, and the following Order was entered on July 26, 1951. We quote from said Order, which is as follows:

"Court Of Appeals Of Kentucky

Before Hon. James W. Cammack, Chief Justice, or Any Judge of Court of Appeals.

No. 329,007. Jefferson Circuit Court,

Chancery Branch, 1st Division.

Patricia R. Smith Sole Beneficiary Of the Estate Of John A. O'Brien, Deceased, Plaintiff,

vs.

Jefferson County Court, Boman L. Shamburger, County Judge, and A. Scott Hamilton, Commissioner, Citizens Fidelity Bank And Trust Company, One of the Co-Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, Defendants.

"Order. At a Court Held July 26, 1951.

This cause having come on to be heard on motion of plaintiff for temporary injunction against the defendants for thirty (30) days after the forty-one (41) original papers of the O'Brien Estate are restored to the Jefferson County Court and establish as part of the record in lieu of the lost originals, arguments were heard by both counsel for the plaintiff and counsel for the defendants, and the Court being sufficiently advised.

It Is Hereby Ordered that a stay of all proceedings and hearings in the O'Brien Estate No. 24.146 in the Jefferson County Court become effective immediately, and continue in effect until the merits of this motion

are ruled upon. It is further ordered that the plaintiff have five days until August 1, 1951, in which to file her brief herein and that the defendant have five days hereafter until August 7, 1951, in which to file their brief herein.

Filed July 26, 1951— /s/ BRADY M. STEWART,
Charles K. O'Connell." Judge."

(Mrs. Smith's Exhibit No. 33, R. I—1040a-1049a.)

The final Opinion from the Court of Appeals of Kentucky in favor of Mrs. Smith restoring the lost or stolen records according to law, as she requested in her appeal, was not rendered until on November 20th, 1953, in the case of Smith v. The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, 262 S.W. 2d 479, November 20, 1953, and the final order in conformity with the opinion legally restoring the records was not filed until October, 1954. The Opinion held:

"Certain original papers in matter of deceased's estate disappeared from the Jefferson Circuit Court, Chancery Branch, First Division, after they had been transmitted there on appeal from county court. The Jefferson Circuit Court, Lawrence F. Speckman, J., entered an order, and appeal therefrom was taken. The Court of Appeals, Cullen, C., held that where Circuit Court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, *carbon copies furnished should have shown, in type form, any signatures that were on the originals.*"

"Order reversed with directions."

"Mrs. Smith filed objections and exceptions to the report, *on the ground that the administrators and their attorneys should have been required to 'sign and certify' the copies furnished by them,* and that Mrs. Smith's attorney should have been permitted to 'sign

> and certify' the copies furnished by him and by Mrs. Smith. The court overruled the objections and entered an order which confirmed the report of the commissioner and found that the supplied papers were 'true, correct, and authentic copies' of the missing originals."
>
> "The order appealed from is reversed, with directions that the court, either directly or through its commissioner, take such further proof as may be necessary to *ascertain what signatures appeared upon the original papers, and cause such signatures to be typed upon the supplied copies.*"

The Opinion restoring the lost records legally was not rendered until one year and eight months after the so-called final Judgment of March 5, 1952, and the amended Judgment of May 1, 1952, were filed in the O'Brien estate in the Jefferson County Court.

The Joint Administrators and their attorneys refused to sign and certify the copies of the Inventory and other documents which they had originally filed in the O'Brien Estate in the office of the Clerk of the Jefferson County Court, to restore the O'Brien records.

They further objected to Counsel for Mrs. Smith signing and certifying the copies of the original papers and documents. which he supplied to restore the lost or stolen records in the O'Brien Estate, which he had originally filed.

Mrs. Smith, the sole beneficiary of the O'Brien Estate, appealed the case in order that all the missing records could be supplied and legally restored, if possible. The Court of Appeals, as shown above, reversed the case and required the Joint Administrators, and their attorneys to sign and certify all of the copies of the original papers which they supplied to restore the records.

The Court of Appeals opinion further ruled that counsel for Mrs. Smith, could sign and certify all of the copies of the original papers which he supplied to restore the papers which he had originally filed for Mrs. Smith in the O'Brien Estate in the Jefferson County Court.

From the foregoing steps which were taken in the Jefferson County Court by Mrs. Smith and in the Court of Appeals of Kentucky, it is crystal clear that she resorted to every step known to her to compel, by Court order, the Joint Administrators to file a final settlement of the Estate of John A. O'Brien in the Jefferson County Court, and in compliance with the Statutes and law of Kentucky, and to stop trumped-up expensive litigation, by the Joint Administrators and their attorneys.

Every contention that Mrs. Smith made was legally sound, and she was upheld in each and every one by the Courts of Kentucky as we have clearly shown, by the opinions quoted herein.

It should be borne in mind that the Joint Administrators held and hold themselves out as experts in the handling and settlement of estates. This record reveals that they were appointed on March 1, 1934, and are still Joint Administrators of the estate of John A. O'Brien. The first Partial Settlement was filed June 21, 1950, and one of the Joint Administrators, The Louisville Trust Company, never did sign or notarize this Partial Settlement.

After the Joint Administrators lost their first settlement suit in the Jefferson Circuit Court and their refusal to comply with the mandate of the Court of Appeals of Kentucky, they conjured up every legal suit and ruse known which reveals a pre-conceived planned pattern by the Joint Administrators and their attorneys among other things to first conceal all the facts surrounding the sale of the part-

nership interest owned by Mrs. Smith in the Edward J. O'Brien Tobacco Company and its four subsidiaries. Third, the continuous and incessant litigation to keep from finally settling the estate in order to have some excuse to charge exorbitant fees for legal services against the estate instead of for the estate. Fourth, in their last action or complaint filed the Joint Administrators are asking for additional fees still in the capacities of Joint Administrators.

It is for the foregoing litigation filed and caused to be filed by the Joint Administrators that the District Court awarded to the Joint Administrators and their attorneys by his order and Summary Judgments on November 9, 1962, the sum of $218,472.80, and the District Court (Judge W. Wallace Kent) refused to have a trial of the within action, and gave no legal reason for not having a trial.

8. The Judgment Of March 5, 1952 And The Amended Judgment Of May 1, 1952, Of The Jefferson County Court Was Obtained By Fraud By The Joint Administrators.

From December 17, 1951, to January 7, 1952, the Joint Administrators had their attorneys to put on a trial in the Estate of John A. O'Brien in the Jefferson County Court, before a Commissioner, which lasted ten days. Mrs. O'Brien-Smith was not present at any of their trial; there was no defendant there and there was not any attorney there to represent Mrs. Smith, only the Plaintiffs-Respondents, the Joint Administrators, and their attorneys and their witnesses were present.

THERE WAS NO PROOF FILED IN THE RECORD OF THE WITHIN ACTION, THAT MRS. SMITH OR ANY ATTORNEY ON HER BEHALF PARTICIPATED IN THE PROCEEDINGS IN THE O'BRIEN ESTATE IN THE JEFFERSON COUNTY COURT. THE JOINT AD-

MINISTRATORS ADMIT IN THEIR COMPLAINT THAT MRS. SMITH DID NOT FILE ANY EXCEPTIONS IN THE JEFFERSON COUNTY COURT TO THEIR PURPORTED FINAL SETTLEMENTS OF THE ACCOUNTS OF THE ESTATE OF JOHN A. O'BRIEN. We again wish to call this Court's attention to the fact that the Joint Administrators did not file in the within action, any testimony, depositions or exhibits of any kind or description from the trial they put on in the Jefferson County Court, or from the Rescission Suit which was filed by Mrs. Smith against the brothers of John A. O'Brien, in fact there was not any testimony of any witnesses or depositions from any of the law suits in the O'Brien Estate filed in the within action except the one deposition of Edward C. Wirotzious consisting of fifty-two typewritten pages, filed on behalf of Mrs. Smith by Order of the District Court on August 28, 1959. (Exhibit No. 35, R. I—1232a-1277a.)

THE FOURTEEN QUESTIONS PRESENTED TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

On the Petitioner Mrs. Smith's Appeal, to the Circuit Court of Appeals there were fourteen questions presented for that Courts' consideration, but they failed and refused to rule on ten of those questions. The questions thus presented were:

I. The District Court Erred In His Findings Of Fact Which Are Not Based On Substantial Evidence And Are Not Binding Because They Are Clearly Erroneous, And In Refusing To Grant A Trial Of This Action.

II. The District Court Erred In Refusing To Have A Trial Of This Action And The Issues Involved In The Sale By The Joint Administrators Of Patricia R. O'Brien-Smith's Twenty Three And Seventy Seven One Hundredths Per Cent (23.77%) Partnership Interest In The Edward J. O'Brien Tobacco Company And Its Four Subsidiaries, For Less Than One Third Of Its Market Value And In Violation Of The Terms Of The Partnership Agreement.

III. The District Court Erred In His Ruling That The Issues Presented By Mrs. Smith's Original Counterclaim Are Barred By The Statute Of Limitations.

IV. The District Court Erred In Denying Mrs. Smith A Trial On The Issues Of Her Counterclaim As A Defense Against Claims Asserted By Joint Administrators For Their Fees And Fees For Their Attorneys.

V. The District Court Erred In Ruling That Mrs. Smith Is Barred From Asserting The Claims Set Forth In Her Original Counterclaim And That The Claims Asserted Are Barred By The Rule Of Res Judicata.

VI. The District Court Erred In Granting The Plaintiffs' Joint Administrators' Motion For Leave To File An Amended Reply To The Defendant's (Mrs. O'Brien-Smith's) First Counterclaim.

VII. The District Court Erred In Granting The Plaintiffs' Joint Administrators' Amended Motion For Summary Judgment As To The Defendant's (First) Counterclaim.

VIII. The District Court Erred In Denying Mrs. Smith's Motion For Leave To File Her First Amended Answer And Amended Counterclaim, Surcharging The Joint Administrators Settlements Of Accounts—And On Bond Of The Estate Of John A. O'Brien.

A. The District Court Erred In Holding That The United States District Courts Have No Jurisdiction Over Probate Matters.

B. The District Court Erred In Holding That The Defendant Mrs. Smith Is Precluded From Surcharging The Joint Administrators Settlements Of Accounts Of The Estate Of John A. O'Brien.

(1) The District Court Erred In Holding That "Whether The Defendant (Mrs. Smith) Took Part In The Proceedings In Connection With The Settlement Of That Account As Required By The Kentucky Statutes."

(2) The District Court Erred In Holding That "She (Mrs. Smith) Took All Possible Steps To Prevent The Settlement Of The Account. It Would Appear That She Had No Objections To Such Accounting, As Such."

(3) The District Court Erred In Holding That "It Appears From The Record That The Defendant (Mrs. Smith) Participated To A Substantial Extent, In The Proceeding Leading To Approval Of The Final Account, By Using Every Remedy Available To Prevent The Consideration And Determination Of The Final Account Filed By The Plaintiffs-Administrators."

(4) The District Court Erred In Holding "That The Defendant (Mrs. Smith) Took Part In And Participated In The Settlement Of The Final Account Within The Meaning Of The Kentucky Law."

C. The District Court Erred In Ruling That Mrs. Smith's Remedy Was By An Appeal From The Order And

Judgment Of The Jefferson County Court Of March 5, 1952, And The Amended Judgment Of May 1, 1952, To The Jefferson Circuit Court, And That The Said Judgment And Amended Judgment Was A Final Order.

IX. The District Court Erred In Denying The Defendant-Appellant Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer And Her Second Amended Counterclaim (Filed On May 15, 1961).

X. The District Court Erred In Overruling Defendant's (Mrs. O'Brien-Smith's) Motion For An Order Requiring The Joint Administrators To Pay Into The District Court The Remaining Cash Assets Held By Them And Belonging To The O'Brien Estate.

XI. The District Court Erred In Failing To Require The Joint Administrators To Pay Interest Compounded At The Rate Of 6% Per Annum On Cash Retained By Them Belonging To Mrs. Smith Since 1936.

XII. The District Court Erred In Overruling The Motion Of Defendant Mrs. Smith To Bar William Marshall Bullitt And All Other Members Of The Law Firm Of Bullitt, Dawson & Tarrant From Representing The Louisville Trust Company And The Citizens Fidelity Bank & Trust Company, The Joint Administrators, Against Her In The Within Action, Because They Represented Mrs. Smith From January 1934 To February 12, 1936.

XIII. The District Court Erred In Its Order And Summary Judgments In Allowing Interest On The Joint Administrators Fees, And Their Attorneys Fees On Their Alleged Over-Payments To Mrs. Smith, Filed And Entered On November 9, 1962.

XIV. The District Court Erred In Granting The Joint Administrators Motion For Summary Judgments By Its Order And The Summary Judgments Filed And Entered On November 9, 1962, Allowing Them The Amount Of $218,472.80.

REASONS FOR GRANTING THE WRIT

1. In deciding that the issue of the sale of Mrs. O'Brien-Smith's interest in the partnership of Edward J. O'Brien Tobacco Company and its four subsidiaries by the Trust Companies, was barred by the proceedings in a Rescission Suit, which was against only the brothers of John A. O'Brien, the Court of Appeals decided an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

One of the main questions in this action which was decided by the United States Court of Appeals for the Sixth Circuit, which was the issue raised by, and set out in the Trust Companies' (the joint administrators of the Estate of John A. O'Brien) Complaint, is the sale made by the Trust Companies of the twenty-eight and thirty-three one hundredths (28.33%) per cent interest in the partnership in the Edward J. O'Brien & Company, (one of the largest independent tobacco brokers in the world), owned by the Defendant Patricia R. Smith, which the Trust Companies sold for less than one third of its market value. The said issue was fully answered and controverted by the Defendant Patricia R. Smith, in her answer and counterclaim filed in the within case on November 12, 1956. On this issue the District Court refused to have a trial, or permit any testimony to be introduced, and the Court of Appeals, upheld the District Court in this ruling.

The Trust Companies were granted the right by the District Court, which was upheld by the Circuit Court of Appeals, to file an Amended Reply to Mrs. Smith's (First) Counterclaim, consisting of one hundred sixty-five (165) printed pages including six (6) exhibits, two years and ten months after the Counterclaim was filed, raising for the first time, on September 8, 1959, as their Sixth Defense to Mrs. Smith's Counterclaim (filed on November 12,

1956), that the proceedings in a rescission suit, and the judgment therein, are res judicata against her of, a bar to, and estop her from asserting in this their third settlement suit which they filed the within suit, to Mrs. Smith's claims set out in her counterclaim, R. II 1381a-1546a. The Trust Companies then filed an Amended Motion for Summary Judgment to dismiss Mrs. Smith's counterclaim on September 8, 1959.

The District Court erred and the Court of Appeals upheld the ruling that Mrs. Smith is barred from asserting the claims set forth in her original counterclaim, filed in the within action on November 12, 1956, and that the claims asserted are barred by application of the rule as to res judicata. (R. I—121a-139a, R. II—1614a-1616a).

The District Court further erred and the Court of Appeals upheld the ruling in upholding the Joint Administrators' theory that all the claims of fraud now asserted by Mrs. Smith were disposed of in the original litigation between Mrs. Smith, the O'Briens and the Joint Administrators, in the case of *Patricia R. O'Brien* v. *Edwin J. O'Brien et al*, 294 Ky. 793; 172 S.W. 2d 595, (1943) and cited a long list of cases, which have no application to the within case, and the District Court did not cite but one Kentucky case to uphold his ruling and neither that case nor any of the other cases cited by him in his opinion are applicable to the within action.

Mrs. Smith's cause of action for the alleged fraud against the Joint Administrators did not arise until the Joint Administrators filed their purported final settlement of their accounts of the Estate of John A. O'Brien in the Jefferson County Court on June 21, 1950, January 7, 1952, and August 7, 1952, and not until after the Judgment of March 5, 1952, and the Amended Judgment of May 1, 1952, was filed in the Jefferson County Court approving the

Joint Administrators so-called final settlement, of the accounts of the Estate of John A. O'Brien. (R. I—233a-330a).

When Mrs. Smith filed the Rescission Suit on March 10, 1937, against James G. O'Brien and the other partners of the Edward J. O'Brien & Company for rescission of the sale of the contract of her partnership interest in the O'Brien Company and its four subsidiaries, the Joint Administrators were made defendant's with the partners of the Edward J. O'Brien & Company and the O'Brien Company and, they were sued in their individual capacities (See R. II—1392a) which is as follows:

"Jefferson Circuit Court
No. 250536. Chancery Branch, Division

Patricia R. O'Brien,.....Plaintiff.
vs. Petition in Equity
Edwin J. O'Brien, sometimes referred to as Edwin J. O'Brien, Jr.,
James G. O'Brien,
Joseph B. O'Brien,
Elizabeth Graves O'Brien,
Marie O'Brien Michael,
Fidelity & Columbia Trust Company, and Louisville Trust Company, the last named sued as Administrators of the Will annexed of John A. O'Brien, deceased, as well as in their individual capacities; and Edward J. O'Brien & Company, a copartnership, composed of the above named individuals, ...Defendants."

On March 22, 1938, the Judge of the Jefferson Circuit Court ruled that the "Petition in Equity in the Rescission Suit", must be reformed and amended. On April 11, 1938, Mrs. O'Brien-Smith complied with the order and filed the "Reformed and Amended Petition in Equity" in the Rescission Suit which is as follows: (R. II—1411a).

"Jefferson Circuit Court
No. 250536 Chancery Branch, First Division

Patricia R. O'Brien, ...Plaintiff.
vs. Reformed And Amended Petition In Equity
Edwin J. O'Brien, Jr.,
James G. O'Brien,
Joseph B. O'Brien,
Marie O'Brien Michael,
Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors under the will of Elizabeth Graves O'Brien, deceased,
The Fidelity & Columbia Trust Company and
The Louisville Trust Company, Administrators of the will annexed of John A. O'Brien, deceased, and,
Edward J. O'Brien & Company, a co-partnership, composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors under the will of Elizabeth Graves O'Brien, deceased, ... Defendants."

and, as shown in the Reformed Petition, the Joint Administrators were not sued in their individual capacities, the Joint Administrators were only named as nominal parties defendant so that Mrs. Smith could maintain the action in her name, since the Joint Administrators had refused to file the Suit for Rescission of the sale of the contract for the partnership interest and its four subsidiaries. No relief was sought against the Joint Administrators in the Petition, nor in the Prayer of the Petition, no proof was introduced against them, nor were they a party thereto, and they were not exonerated of the duties imposed upon them as Administrators of the Estate of John A. O'Brien, in the Rescission Suit.

The District Court erred and the Court of Appeals upheld him in his ruling that Mrs. Smith claimed fraud on

the part of all parties concerned in the Rescission Suit, meaning the Joint Administrators as well as the partners in the O'Brien Company, in the Rescission Suit. The Court of Appeals of Kentucky held in the Rescission Suit that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the book value, or the market value of her interest in the O'Brien partnership and the four subsidiaries, but it was the duty of her counselors and advisors to tell her the market value of her partnership interest. Those counselors and advisors were J. G. McPherson, George D. Caldwell and William Marshall Bullitt, the Joint Administrators' attorney who owned over fifty-one (51%) per cent of the Citizens Fidelity Bank & Trust Company. No relief was sought or prayed for in the Prayer of the Petition in the Rescission Suit against the Joint Administrators. Mrs. Smith did not know at that time that the Joint Administrators were guilty of fraud, misrepresentation, mismanagement, negligence, failure to disclose, concealment, misappropriation of her cash and funds in their possession, and that they transferred thousands of dollars worth of stocks that was in the name of the Edward J. O'Brien Tobacco Company, of which she owned twenty three and seventy seven one hundredths (23.77%) per cent, to a former partner until after the Joint Administrators filed their final settlement of accounts of the Estate of John A. O'Brien on June 21, 1950, January 7, 1952, and August 7, 1952, in the Jefferson County Court.

The District Court erred and the Court of Appeals upheld his ruling in his statement in paragraph three (3) on page 2 of his opinion, that the "plaintiff's (joint administrators) Original Motion for a Summary Judgment," filed in the within case on February 19, 1957, to dismiss Mrs. Smith's original counterclaim, which was filed in the within case on November 12, 1956, with her "original answer," was based upon the theory that the defendant, Mrs. Smith,

is barred by the rule of res judicata from raising the issues presented by her original counterclaim.

The District Court (Judge W. Wallace Kent) *is the one who suggested to the Joint Administrators and their attorneys at a pre-trial conference in Louisville on August 28, 1959, that they should raise the issue of the rule of res judicata,* and gave the attorneys for the Joint Administrators the law citation of *Davis* v. *McKinnon and Mooney,* and told them that he would mail them the advanced sheets before the opinion was printed, in order to help them to try to prove it.

At the pre-trial conference, counsel for Mrs. Smith stated to the District Court that no relief was sought against the Joint Administrators, and no relief was prayed for in the Reformed and Amended Petition, filed on April 11, 1938 in the Rescission Suit, in the case of *O'Brien* v. *O'Brien,* 294 Ky. 793; 172 S.W. 2d 595. Counsel for Mrs. Smith further stated to the District Court that the Joint Administrators were only named as nominal parties defendant in the "Rescission Suit," so that Mrs. O'Brien-Smith could maintain the "Rescission Suit" in her name after the Joint Administrators refused to file the suit for rescission of the sale of the partnership interest belonging to the Estate of John A. O'Brien, deceased, in the Edward J. O'Brien Tobacco Company, which Mrs. Smith inherited.

Judge E. B. Freed, Judge of the United States District Court at Cleveland, Ohio, after reading the entire Printed Record and pleadings in the Joint Administrators first settlement suit, and the Rescission Suit, upheld Mrs. O'Brien-Smith in her contentions, and ruled that the case of O'Brien v. *O'Brien, supra, did not make the issue of fraud against the Joint Administrators res judicata,* and *overruled the Joint Administrators Motion for a Summary Judgment and we quote the ruling of Judge Freed and copy herein his order on his opinion in the case of—*

"In the United States District Court for the Western District of Kentucky at Louisville, No. 870, *Patricia R. Smith* v. *The Louisville Trust Company and The Citizens Fidelity Bank and Trust Company*, filed on March 16, 1945, which was dismissed without prejudice by Mrs. Smith on March 10, 1949."

"In The District Court of The United States For The Western District of Kentucky Louisville Division

"PATRICIA R. SMITH)
v.)
THE LOUISVILLE TRUST)
COMPANY, a corporation, et al)

CIVIL ACTION NO. 870

ORDER

This matter came on for hearing on the motion of the defendants, The Louisville Trust Company and Citizens Fidelity Bank and Trust Company, for a summary judgment under favor of Rule 56 of the Rules of Civil Procedure, the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED *that the motion for summary judgment be and is hereby overruled.*

s/ E. B. FREED
United States District Judge"

November 7, 1947

"In The District Court Of The United States For The Western District Of Kentucky Louisville Division

CIVIL ACTION NO. 870

PATRICIA R. SMITH)
vs.)
THE LOUISVILLE TRUST)
COMPANY, a corporation, et al.,)

FREED, J:

MEMORANDUM RE MOTION FOR SUMMARY JUDGMENT

Defendant's (the two Trust Companies) motion for summary judgment is predicated on the contention

that two prior actions in the State Courts of Kentucky prohibit a right of recovery by the Plaintiff (Mrs. O'Brien-Smith) in this Court. The prior actions were referred to in the Defendants' (the two Trust Companies) answer, in the respective briefs of the parties and arguments of counsel as the "Rescission suit" and "Settlement suit."

The record in the Settlement suit clearly discloses that the Court refused to adjudicate the precise claim of Plaintiff (Mrs. O'Brien-Smith) urged in this action. It refused to receive any evidence in support of the charge of negligence by the Defendant corporations in handling the estate of John O'Brien. Such ruling by that Court in the Settlement suit cannot conceivably result in a bar to the instant controversy.

Whether the judgment in the case of *O'Brien* v. *O'Brien,* (294 Ky. 793), (172 S.W. 2d 595) the Rescission suit is res judicata as to this action or constitutes an estoppel by judgment must be determined by the Law of Kentucky. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.* (309 U.S. 4); *In re Potts,* 6 Cir., (142 F. (2d) 883); *Waybright* v. *Columbian Mutual Life Insurance Co.,* 6 Cir., (122 F. (2d) 245).

To render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties for whom or against whom the claim is made. *Swift Coal and Timer Co.* v. *Cornett,* (249 Ky. 760); *Ralph Wolff & Sons* v. *New Zealand Insurance Co.* (248 Ky. 304)."

"In the case of *Prewitt* v. *Wilborn,* (184 Ky. 639), the Court of Appeals clearly pointed out the distinction between the doctrine of res judicata and estoppel by judgment as follows:

"A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties, upon the same cause of action, and a second suit between the same parties upon a different cause of action. In the first instance, the judgment is a com-

plete bar to the second action, not only as to everything which 'was used in the first action to sustain or defeat the demand, but, everything, which the parties could have used properly for that purpose; but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estoppel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision and is not conclusive as to matters not decided, and the decision of which was not essential to the decision in the first suit, although issues may have been made in reference to them.' "

It is readily discernible from the examination of the Rescission Suit and this action, that there is lacking the identity of the quality of the parties necessary to bring the Rescission suit within the ambit of the doctrine of res judicata or estoppel by judgment. The principles of law laid down by the Kentucky courts applied to the causes of action in issue leads the Court to the conclusion that the motion for summary judgment must be overruled.

s/ E. B. FREED
United States District Judge"

November 6, 1947

The law that was in effect and controlling on the issues of res judicata on November 7, 1947, and in effect when the Joint Administrators committed fraud in the sale of the interest of the estate of John A. O'Brien, deceased, which was owned by Patricia O'Brien-Smith in Edward J. O'Brien Tobacco Company and its four subsidiaries for less than one-third (1/3) of the net sound market value, is the law that is controlling in the within case, and the citation given to the Joint Administrators by the District Court (Judge Kent) of *Davis* v. *McKinnon and Mooney*, 266 Fed. 2d 870, 873 (1959), does not apply to the instant case, and none of

the other cases cited on pages 7 and 8 of the District Courts opinion have any application to the within case. (R. II—1614a-1617a.)

As will be noted from the opinion of Judge Freed of November 6, 1947, on the Joint Administrators motion for summary judgment, on the same issue that Judge Kent ruled on and the Court of Appeals upheld his ruling that Judge E. B. Freed of Cleveland, Ohio, ruled that "whether the judgment in the case of *O'Brien* v. *O'Brien,* (294 Ky. 793), the Rescission Suit is res judicata as to this action or constitutes an estoppel by judgment must be determined by the law of Kentucky". See the cases of *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.* (309 U.S. 4); *In re Potts,* 6 Cir., (142 F. (2d) 883); *Waybright* v. *Columbian Mutual Life Insurance Co.,* 6 Cir., (122 F. (2d) 245). Therefore, the case of *Davis* v. *McKinnon & Moone* 266 Fed. (2d) 870, 873 (1959), which was cited in the District Court's opinion in the within action that was tried in the Common Pleas Court of Lake County, Ohio, *has no application to a case in Kentucky, in an action against Joint Administrators because they violated their trust and their bonds and their fiduciary duties in the settlement of the estate of John A. O'Brien, deceased.*

Further, Judge Freed held that "to render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties for which or against whom the claim is made, '*Swift Coal and Timber Co.* v. *Cornett,* (249 Ky. 760); *Ralph Wolff & Sons* v. *New Zealand Insurance Co.* (248 *Ky.* 304)' ".

Upon examination of the other cases cited on pages 7 and 8 of the District Court's opinion you will see that not a single one of the cases apply to the instant case. The Dis-

trict Court and the Court of Appeals should have applied the laws of Kentucky on the issue of res judicata as stated in the opinion of Judge E. B. Freed.

The adoption of the rule in the *Davis* v. *McKinnon & Mooney* case by the District Court, which was upheld by the Court of Appeals, is not the rule in Kentucky and never has been. If it is the rule now in Ohio, it did not become so until May 28, 1959, and that is years later than when this cause of action arose in the state of Kentucky.

The adoption of this rule of law now (1961 and 1964) in Kentucky which grew out of a decision in Ohio in 1959 (*Davis* v. *McKinnon and Mooney)* certainly should not be used to govern the findings in a law suit where the cause of action arose ten years or more before the decision in the *Davis* v. *McKinnon & Mooney* case, and after the litigation was instituted regardless of the unfairness of the application in the instant case it is not the rule in Kentucky and the Kentucky law should control in this decision.

Governor Wilbur M. Brucker of Detroit, Michigan, former governor of Michigan, and former Secretary of the Army, represented Mrs. O'Brien-Smith from 1940 to 1944 in the "Rescission Suit" against the O'Brien brothers, and he stated to the Joint Administrators more than once that no relief was sought against them in the "Reformed and Amended Petition filed in the Rescission Suit," nor prayed for in the prayer of the Petition in the Rescission Suit, no proof was introduced against them in the Rescission Suit, and that they were only named as nominal parties, defendant, so that Mrs. O'Brien-Smith could maintain "The Rescission Suit," in her own name, after the Joint Administrators refused to file suit for Rescission of the Contract for the sale of Mrs. Smith's partnership interest in the O'Brien Company.

It was not necessary for the Joint Administrators to employ attorneys in the "Rescission Suit" and to file strong briefs against the estate of John A. O'Brien and Mrs. O'Brien-Smith, and when the first opinion was rendered in the Rescission Suit by the Court of Appeals of Kentucky, it was a divided court. One judge was home ill, but three of the judges were of the opinion that Mrs. O'Brien-Smith was entitled to eighty-five thousand ($85,000.00) dollars or more because that was the net profit belonging to the estate of John A. O'Brien, deceased, for the year of 1935 from Edward J. O'Brien & Company and its four subsidiaries, which was not disclosed to the defendant Mrs. O'Brien-Smith before her partnership interest was sold. The Joint Administrators and their attorneys should have joined with Governor Brucker in filing briefs on the petition for rehearing in the Rescission Suit and in the Oral Argument of Governor Brucker before the Court of Appeals of Kentucky on the Petition for rehearing; instead, the Joint Administrators and their attorneys joined with the O'Brien brothers and bitterly fought against the estate and bitterly opposed Mrs. O'Brien-Smith throughout the "Rescission Suit." Now why should this estate pay either the Joint Administrators or their attorneys in the "Rescission Suit." The above was all set out in the "Defendant's, Mrs. Smith, Response to Joint Administrators Printed Reply to Mrs. O'Brien-Smith's original counterclaim."

The District Court erred and the Court of Appeals upheld his ruling, and we ask this Court to consider this question; "Should lawyers be paid for law suits filed and prosecuted in an estate, when they lost each and every suit in the Court of Appeals of Kentucky and even after the Court of Appeals of Kentucky ruled against them, the Joint Administrators defied the Rulings of the Court of Appeals of Kentucky; they defied the ruling of the Judges of the Jefferson

County Court and kept on filing suits and appeals in the Jefferson Circuit Court, and the Court of Appeals of Kentucky, lawyers who hold themselves out as being well versed on Kentucky law and administrators who claim they have the largest banks and trust companies in Kentucky. Thus, the estate of John A. O'Brien and Mrs. Smith should be reimbursed for the expenses of those law suits and for the long years of tiresome and expensive litigation, which Mrs. Smith has had to pay for out of her own pocket all because the trust companies and their attorneys knew they had committed fraud in the sale of the interest owned by Mrs. O'Brien-Smith in the Edward J. O'Brien Tobacco Company, and its four subsidiaries and other acts of fraud and they were hoping to wear down the resistance of Mrs. O'Brien-Smith and her lawyers and to force her to give up her legal rights and claims in the estate of John A. O'Brien, deceased.

(2) The District Court Erred In His Findings Of Fact Which Are Not Based On Substantial Evidence And Are Not Binding Because They Are Clearly Erroneous, And In Refusing To Grant A Trial Of This Action and the Court of Appeals Accepted His Findings Of Fact—Page 2 Of The Opinion.

The District Court (Judge W. Wallace Kent, sitting by designation) denied Mrs. Smith the right of a trial in this action. The facts in this action are disputed and the issues presented are not solely those of law.

The principle issue before the Court as was stated at the outset of our Petition, is the sale of Mrs. Smith's interest in the partnership of Edward J. O'Brien & Company and its four subsidiaries by the Joint Administrators of the estate of John A. O'Brien, for less than one third of its market value, and in violation of the terms of the partnership agreement.

Mrs. Smith was denied the right to submit any evidence as to the surrounding facts and circumstances existing both preceding, leading up to, and at the time of the execution of said contract. These are all factual issues.

On April 2, 1957, the Judge of the District Court before whom this case was being heard, entered an order that he would proceed no further in this case. (See Appendix B hereto, Printed Transcript of Record, Volume I, pages 393a-394a).

It was contended by Martin R. Glenn, Clerk of the U. S. District Court for the Western District of Kentucky at Louisville, that he wrote a letter on April 2, 1957, to Honorable Charles C. Simons, Chief Judge of the U. S. Court of Appeals for the Sixth Circuit, requesting him to assign a Federal Judge to hear this action. (R. I—396a).

No Judge was appointed to hear this action until two years and three months later, until on July 31, 1959, there was entered in the within action, an order designating the Honorable W. Wallace Kent, U. S. District Judge, Western District of Michigan, for service in another District within his Circuit to hear this action. (R. I—431a).

On July 25, 1959, before the Order of designation of July 31, 1959, was filed in the Clerk's office, there was an order entered in the within action setting this case for a Hearing on all pending motions at Louisville, Kentucky on August 27, 1959, and for a Pre-trial conference, on August 28, 1959. (R. I—430a-431a).

Bear in mind no steps had been taken, no pleadings of any kind had been filed in this action for over two years. It was not Mrs. Smith or her counsel who had caused the delay.

When the order of designation was filed on July 31, 1959, six days before that on July 25, 1959, the case was set for

a hearing on August 27, 1959. Counsel for Mrs. Smith was at Camp Breckinridge, Kentucky, where he had been for approximately ten (10) days as Commanding Officer of the 2148th U. S. Army Garrison Unit composed of some eighty five officers and two hundred sixty seven enlisted men. This Army Garrison Unit was undergoing its annual active duty training, and counsel for Mrs. Smith could not return to Louisville until early August, 1959. The supervising and staff work in the training of this Garrison Unit required the personal presence of its Commanding Officer since the unit was trying to achieve a superior rating, which it did.

On August 5, 1959, counsel for Mrs. Smith, filed a motion for thirty days extension of time in which to prepare for a hearing on all pending motions and for the pre-trial conference and the filing of a brief, in the within action, and filed an affidavit in support thereof, and took the said motion and affidavit to Judge Kent in Grand Rapids, Michigan. The motion was very summarily overruled and an order was entered overruling the said motion on August 8, 1959. (R. I—432a-451a).

The District Court erred in arbitrarily denying counsel for Mrs. Smith, time to adequately prepare for the hearing on motions heard on August 27, 1959, and the pre-trial conference on August 28, 1959. Judge Kent did not rule on the two motions for one year and seven months, until on March 4, 1961, when he rendered a seventeen page opinion R. II—1607a-1629a), and on April 20, 1961, an order was entered thereon (R. II—1636a).

The District Court (Judge W. Wallace Kent) only came to Louisville twice, and only heard arguments on motions twice, namely on August 27, 1959, and November 9, 1962. The Transcript of the Hearing on Motions on August 27, 1959, will be found on pages 1314a-1380a, Volume II,

Printed Transcript of Record. The Transcript of the Hearing on Motions on November 9, 1962, will be found on pages 2135a-2174a, Volume II, Printed Transcript of Record.

On August 28, 1959, (on Judge Kent's first trip to Louisville) there was a pre-trial conference had. On August 27, 1959, the day before the pre-trial conference in the open court room, Judge Kent stated that Mrs. O'Brien-Smith could not attend the pre-trial conference unless she was ready to compromise the case with the Joint Administrators. Mrs. Smith made no attempt after that statement was made to attend the pre-trial conference. On August 28, 1959, when the pre-trial conference was had (not in the open court room but in the private chambers of Judge Roy Shelbourne in the District Court), Judge Kent refused to permit the secretary for counsel for Mrs. Smith, to take any notes at the hearing and ordered him to leave the conference, which he did.

On October 6, 1962, the District Court wrote a letter to the Clerk of the District Court to notify counsel for the Plaintiff and counsel for the Defendant, that the within action was set for trial, on December 3, 1962; such notice was received by counsel. (R. II—2046a-2047a.)

On November 9, 1962, motions were heard before the District Court on "Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer and Her Second Amended Counterclaim, and Exhibits Numbers 42 through 75 (except Exhibit No. 51, which was inadvertently omitted), which had been filed on May 15, 1961". (R. II—1706a-1989a) and the "Plaintiffs" (Joint Administrators) Motion For Summary Judgments In Their Favor On All Pending Claims And Counterclaims, And Their Notice Thereof And Of Hearing Thereon, which had been filed on October 26, 1962". (R. II—2053a-2064a.) The District Court overruled Mrs. Smith's Motion, entered an order and granted

the Joint Administrators' Motions for Summary Judgments and gave no reason for not having a trial of this action, (R. II—2090a-2093a), and granted to the Joint Administrators and their attorneys Two Hundred Eighteen Thousand Four Hundred Seventy Two Dollars and Eighty Cents ($218,472.80) for fees and interest for the settlement of the estate of John A. O'Brien upon which they reported in the inventory to have a market value of Five Hundred Nine Thousand Dollars ($509,000.00). (R. II—1982a-1989a.)

The Joint Administrators complaint filed in the within action consisting of twenty-eight (28) printed pages and filed therewith was their Exhibit No. I, a printed copy of "Their Account and Final Settlement of the Execution of Their Trust", of the estate of John A. O'Brien, deceased, which they had filed in the Jefferson County Court on June 21, 1950, consisting of thirty-seven (37) printed pages with six (6) exhibits copied therein pertaining to the sale of Mrs. O'Brien-Smith's partnership interest in the Edward J. O'Brien & Company and its four subsidiaries. Witness the great length to which the Joint Administrators have gone in stating and stressing the facts of the case, in regards to the negotiations and sale of Mrs. O'Brien-Smith's partnership interest, constituting a recognition by them that the principle issues are factual. (R. I—13a-99a.)

The Transcript of Record of this case consists of two thousand six hundred twenty-five (2,625) printed pages, but no testimony was given in this action in the District Court. There was only one deposition filed in the within action and that was the deposition of Edward C. Wirotzious, which was not taken in this action, it was taken in the Rescission Suit (which was only against the brothers of John A. O'Brien), but had never been filed in any action before, which was filed on behalf of Mrs. Smith, in the

within action consisting of fifty-two (52) typewritten pages, each page signed by him and when printed it consisted of forty-eight (48) pages, which completely refutes all statements contained in the Joint Administrators' complaint and their Exhibit No. I thereto, pertaining to the market value, the negotiations, and the sale of Mrs. Smith's partnership interest, by the Joint Administrators. (R. I—1230a-1277a.)

The District Court (Judge W. Wallace Kent) handed down an opinion on March 4, 1961, consisting of seventeen (17) typewritten pages, and almost half of each page consisted of his listings of the four lawsuits and three appeals filed and prosecuted in the O'Brien estate in the Courts of Kentucky by the Joint Administrators, from February 18, 1937, to November 20, 1953, (which were all won by Patricia O'Brien-Smith in the Court of Appeals of Kentucky and are printed decisions as set-out in our statement of facts), and the Judgment and Amended Judgment of the Jefferson County Court of March 5, and May 1, 1952. (R. II—1607a-1629a.)

The District Court adopted almost verbatim, the proposed Findings as submitted by the Joint Administrators, and a so-called Judgment of March 5, 1952, and the Amended Judgment of May 1, 1952, of the Jefferson County Court. The findings as announced by the District Court are not correct. His findings are not supported by law or the record evidence, yet the Court of Appeals accepted the District Court's findings without reviewing them.

The District Court accepted the proposed Findings of Fact and Conclusions of Law of the Joint Administrators with respect to one of the most important phases of the within action. We proposed that the Joint Administrators should be required to account to Mrs. Smith for the full

market value of her partnership interest in Edward J. O'Brien & Company and its four subsidiaries, which they sold in 1935.

The District Court erred in his finding of fact throughout his opinion and an example is on the first and second page of his opinion, his finding in regards to Mrs. O'Brien-Smith and the members of the family of John A. O'Brien. His statements are erroneous because there is no proof in the record that there was ever a dispute between Mrs. O'Brien-Smith and the members of the family of John A. O'Brien, as to the validity of the testamentary instruments found after the death of John A. O'Brien; there was no dispute as to the value of his interest in the Edward J. O'Brien & Company; the effectiveness of an insurance trust; or any other matters.

Mrs. Smith's Statement of Facts herein are amply supported by numerous direct references to the printed Transcript of Record.

On April 3, 1961, counsel for Mrs. Smith filed, "Defendant's (Mrs. Smith) Petition For Rehearing" on the District Court's Opinion consisting of thirty-six pages (R. II – 1646a-1691a).

On April 21, 1961, an order was entered by the District Court which overruled the "Defendant Mrs. Smith's Petition For Rehearing" (R. II—1697a-1698a).

(3) The District Court Erred In Refusing To Have A Trial Of This Action And The Issues Involved In The Sale By The Joint Administrators Of Patricia R. O'Brien-Smith's Twenty Three And Seventy Seven One Hundreds Per Cent Partnership Interest In The Edward J. O'Brien Tobacco Company And Its Four Subsidiaries, For Less Than One Third Of Its Market Value And In Violation Of The Terms Of The Partnership

Agreement And The Court Of Appeals Upheld His Rulings.

We come now to the consideration of the all-important negotiations for the sale of Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company and its four subsidiaries by the Joint Administrators of the estate of John A. O'Brien on November 5-15, 1935, purportedly to James G. O'Brien one of the partners in the Company.

The Record of this case disclosed that the offer made to Mrs. O'Brien-Smith, for the purchase of her partnership interest was written and composed by J. G. McPherson and George D. Caldwell, the two Vice-Presidents of the two Trust Companies, the Joint Administrators of the estate of John A. O'Brien, the plaintiffs in the within action, and by the two attorneys representing the Joint Administrators of the O'Brien estate namely William Marshall Bullitt, who represented the Citizens Fidelity Bank & Trust Company, and Squire Ogden of the law firm of Gordon, Laurent and Ogden, who was paid two thousand ($2,000.00) dollars from the O'Brien estate, to represent the Louisville Trust Company one of the Joint Administrators, and the three brothers of John A. O'Brien.

There is no proof in the record of this action that Edward C. Wirotzious, or any accountant for Mrs. Smith, or that Judge L. R. Curtis, a friend of Mrs. O'Brien-Smith, who attended two conferences, ever even saw the offer or contract for the purchase of the partnership interest or the bill of sale or deeds for Mrs. Smith's partnership interest. The only counselors and advisors that Mrs. O'Brien-Smith had and the only ones paid from the O'Brien estate for advice before her partnership interest was sold were, J. G. McPherson, George D. Caldwell and William Marshall Bullitt of the law firm of Bruce & Bullitt, now the law firm of Bullitt, Dawson & Tarrant.

The Court of Appeals of Kentucky held in the Rescission Suit of Patricia R. O'Brien v. Edwin J. O'Brien et al, 294 Ky. 793, 172 S.W. 2d 595, *that Mrs. O'Brien-Smith was the sole beneficiary of the will and the estate of her late husband John A. O'Brien.*

The Court of Appeals of Kentucky held in the Rescission Suit, that there was no endorsement of any insurance trust agreement on the policies which would make payable to the brothers of John A. O'Brien any of the two hundred one thousand ($201,000.00) dollars of life insurance which was payable to Ivy Patricia O'Brien (now Smith).

The Court of Appeals opinion in the Rescission Suit stripped the Joint Administrators of all their claimed compromising points which induced Mrs. Smith to sell her partnership interest, such claims were not legitimate and were wholly without merit or legal foundation, they were only bogus claims, in order to bring about the sale of Mrs. Smith's partnership interest, by the Joint Administrators.

The statement of facts set for in this Petition stand uncontradicted and undisputed by the Joint Administrators of the O'Brien estate or anyone else.

The record in the within action clearly proves that the Joint Administrators misrepresented the market value and the book value of the partnership interest and the law and facts to Mrs. O'Brien-Smith in order to induce her to agree to the sale of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries by the Joint Administrators, for less than one third (1/3) of its market value, and in violation of the terms of the partnership agreement between the partners of the O'Brien Company, which is clearly proven by the eighty-two (82) exhibits of Mrs. O'Brien-Smith filed and tendered for filing in the Record in the within action and the deposition of

Edward C. Wirotzious, filed in the within action on behalf of Mrs. O'Brien-Smith by order of the District Court on August 28, 1959, which are referred to in the statement of facts.

The Joint Administrators violated their statutory duties imposed upon them by law in Kentucky in every respect, in their representing Mrs. O'Brien-Smith, and the Estate of John A. O'Brien, as we have clearly shown and proven.

The Joint Administrators, upon qualification, took title to the property of the estate of John A. O'Brien, including all his interest in the partnership firm of Edward J. O'Brien & Co. and its four subsidiaries. *A provision of the partnership articles, of a substantial advantage to the estate, allowed five years' participation by a deceased partner's estate in the profits of the business following a partner's death.* Yet, the Joint Administrators, entirely disregarding this advantage, immediately began to manipulate and maneuver by their actions, strategy, and misrepresentations to dispose of the estate's interest in the Edward J. O'Brien & Co. and its four subsidiaries for less than one third of its value. *The Joint Administrators created "bogus" claims, intimidated, threatened and made numerous misrepresentations to coerce and force the Defendant Patricia O'Brien-Smith to acquiesce in their scheme to dispose of the partnership interest on terms highly beneficial to the surviving partners, whose favor they curried because of their various extensive business relations and dealings, calculated ultimately for their own private profit;* all to the great detriment and loss to the estate, and Mrs. Smith to which they owed sole loyalty and duty. In addition to actual threats made in regard to such matters as a non-existent insurance trust agreement, knowing full well no such agreement existed, the Joint Administrators insisted the land and buildings of the partnership business

was real estate in the sense that Mrs. O'Brien-Smith would get only 1/3 for life, rather than the entire interest owned in the O'Brien Company and its four subsidiaries by John A. O'Brien, which he left Defendant Patricia O'Brien-Smith under the terms of his will, as ruled and held by the Court of Appeals of Kentucky in Mrs. Smith's favor.

Despite the expert knowledge and skill the Joint Administrators profess to possess in business, financial matters, and the administration of estates, they made no effort to determine the actual market value of the interest owned in the Edward J. O'Brien & Co. by the estate of John A. O'Brien which they represented, for the sole heir Patricia O'Brien-Smith. The mere fact they sold and conveyed that interest, worth more than one million dollars, for only $380,000.00 speaks for itself! But more than that, *the undenied and undisputed facts disclose that they made no attempt to obtain or make an independent audit, inventory or appraisal, to accurately determine the market value of those assets.* In fact, they did not even insist or require the surviving partners to submit a current audit or balance sheet. These acts alone are sufficient to clearly demonstrate their lack of, at least the ordinary skill, prudence and diligence owed the estate and Mrs. O'Brien-Smith in their fiduciary capacity, and, consequently their negligent handling of the estate. But the facts—and the issues in this case—go far beyond simple negligence. Witness the deliberate falsification made to Mrs. O'Brien-Smith that the partnership business operated at a loss during the year of 1935 prior to the sale, and the Joint Administrators admit that the partnership interest was sold on the basis of the values shown on Mrs. Smith's Exhibit No. 53, page 32-39 of this Petition, which resulted in a loss to Mrs. Smith of over Eight Hundred Thirty Six Thousand Five Hundred Thirty Six Dollars and Fifty Seven Cents ($836,536.57) on the

basis of Twenty Three and Seventy Seven Hundredths per cent (23.77%), the admitted percentage owned by Mrs. Smith, as shown on pages 56 and 57 of the within Petition, also see R. II—1920a and on the basis of her rightful ownership of Twenty Eight and Thirty Three Hundredths per cent (28.33%) the loss to Mrs. Smith was One Million One Hundred Sixty Thousand Four Hundred and Thirty Nine Dollars and Fifty Five Cents ($1,160,439.55), as shown on pages 69-70 of this Petition. The overall misrepresentation and disloyalty of the Joint Administrators, along with their failure to secure to the estate all that was rightfully due, established a definite and real loss to the estate and a recognized cause of action for the sole heir, the Defendant Patricia O'Brien-Smith, which the District Court by its rulings has denied to her, and the Court of Appeals upheld the ruling.

The District Court refused to have a trial of the issues in the within action, and the Court of Appeals upheld this ruling thereby preventing the introduction of the proof that would prove that the Joint Administrators and their attorneys connived and conspired with the brothers of John A. O'Brien, to conceal the true market value of Mrs. O'Brien-Smith's Partnership interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries. *That the Joint Administrators were not entitled to any fees at all and that their attorneys were not entitled to any additional fees, for representing the Joint Administrators and that they were guilty of fraud, misrepresentation, mismanagement, negligence, coercion, undue influence, and threats of claims which were not legitimate or meritorious.*

The Joint Administrators, in order to further coerce and force Mrs. O'Brien-Smith to sell her Partnership interest in Edward J. O'Brien Tobacco Company and its four subsidiaries *before the end of the five (5) years as provided*

for in the Partnership Agreement, would not require the Edward J. O'Brien Tobacco Company, to pay to Mrs. O'Brien-Smith any profits due her each year from her interest in the O'Brien Company and its four subsidiaries, and she was required to borrow money from the Fidelity and Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, at the rate of 5% per annum to live on until they sold her Partnership interest purportedly to James G. O'Brien sometime in 1935. The amount which Mrs. O'Brien-Smith borrowed to live on was fifteen thousand ($15,000.00) dollars. See copy of cancelled notes which were paid after the Partnership interest was sold by the Joint Administrators, Defendant-Appellant Mrs. O'Brien-Smith's Exhibits No. 27, 27a, 27b and 27c, pages 669a to 677a, Volume I, Printed Transcript of Record, filed as Appendix B hereto.

The Court of Appeals stated on page four of its opinion, that "In view of our holding on the question of res judicata, we do not find it necessary to discuss in this (its) opinion, the question of the Statute of Limitations." Realizing full well that the District Court had erred in his ruling on that issue.

See Petition for Rehearing on District Court's opinion, R. I—pp. 1667a-1676a Appendix B hereto.

4. The District Court Erred And The Court Of Appeals Upheld This Ruling In Denying Mrs. Smith A Trial On The Issues Of Her Counterclaim As A Defense Against Claims Asserted By Joint Administrators For Their Fees And Fees For Their Attorneys.

Another aspect of the law in relation to the plea of limitations should have been considered by the District Court on the Joint Administrators motion for Summary Judgment. Mrs. Smith's counterclaim for loss on the sale of

decedent's partnership interest cannot be barred by limitations as a defense against the claims asserted by the Joint Administrators and their attorneys. The counterclaim relating to the sale of the partnership interest arises out of the same occurrence or transaction sued on by plaintiffs Joint Administrators, namely the administration by the Joint Administrators of the estate of the decedent. In such cases, the counterclaim is also a defense, and as long as this court will hear the Joint Administrators case, time will not bar the answer of the defendant, Mrs. Smith.

The principle that the statute of limitations has no application to a counterclaim arising out of the same occurrence or transaction sued on is further announced in the case of *Lewis* v. *Kash,* 239 Ky. 38 S.W. (2d) 978, where the court said and held:

> "As pointed out in the case of *Lusher et al* v. *Security Trust Co. et al,* 178 Ky. 593, 199 S.W. 613, L.R.A. 1918C, 615, the cases of *Altman & Taylor Co.* v. *Meade,* 121 Ky. 241, 89 S.W. 137, 28 Ky. Law Rep. 208, 123 Am. St. Rep. 193; *Weakley* v. *Meriweather,* 156 Ky. of 304, 160 S.W. 1054, and cases cited therein announced the rule that the pleas of limitations will not prevail against the right of the defendant to assert by way of counterclaim transactions connected with and growing out of the matter that was the basis of the suit."

The foregoing rule is recognized in Federal procedure, and is stated in Moore, Vol. 3, p. 25, as follows:

> "13.11 Statute of Limitations
>
> As pointed out in Sec. 13.02, supra, there is no difference for purposes of pleading between so-called 'set-off,' 'recoupment,' and 'independent claims'; all constitute counterclaims. This in no way affects the substantive problem as to whether the statute of limitations has run against the claim pleaded as a counterclaim. This recoupment, which is necessarily based

on matter arising out of the transaction sued on, when used only to defeat the plaintiff's claim, is never barred by the statute of limitations so long as the main action itself is timely."

5. The District Court Erred In Granting The Plaintiffs' Joint Administrators' Motion For Leave To File An Amended Reply To The Defendant Mrs. O'Brien-Smith's First Counterclaim And The Court of Appeals Upheld This Ruling.

The District Court erred in granting the "Plaintiffs' Joint Administrators' Motion for leave to file an amended reply to the Defendant Mrs. O'Brien-Smith's first Counterclaim." Almost three years after Plaintiffs filed their reply to the Defendant Mrs. O'Brien Smith's first counterclaim, they tendered their amended reply, raising for the first time the plea of res judicata, invoking Rule 15 of the Federal Rules of Civil Procedure and asserting as grounds for this new defense the decision of *Davis* v. *McKinnon & Mooney,* 266 F. (2d) 870, decided May 28, 1959. Their amended reply was not tendered until September 8, 1959; yet from July 22, 1959, when notified by the Court (Judge Kent) that a hearing on their first motion for summary judgment, and all other pending motions, would be held on August 27, 1959, wherein briefs were written and full arguments were had in the District Court on said date, they had ample opportunity to assert any additional defenses. In this manner, before the District Court rendered a decision, the Joint Administrators were erroneously allowed to raise the plea of res judicata, as their sixth defense, in their amended reply.

Rule 15 does not permit or allow for amended replies in this manner, which are not meritorious. The case of *Davis* v. *McKinnon & Mooney* has no application to the issues of the counterclaim filed by the Defendant Mrs. O'Brien-Smith for reasons that the principles of law laid down by the

Kentucky Courts govern on the question of res judicata, and the cited case does not alter or change the rule in Kentucky nor the applicable law in this litigation on the point. Further, as Judge E. B. Freed ruled in 1947 against these Joint Administrators on the identical issue, the Rescission Suit, as determined by applicable Kentucky law, did not and does not constitute a bar to the issues raised by Mrs. Smith's counterclaim. The case of *Davis* v. *McKinnon & Mooney* does not alter the duties and responsibilities imposed by the statutory and decision law of Kentucky upon administrators, so as to bar the Defendant Mrs. Smith from now raising the issues of fraud, misrepresentation, concealment, failure to disclose, negligence and mismanagement by the Joint Administrators of the O'Brien Estate. Thus, there were no valid grounds for allowing the filing of the amended reply and the District Court erred in so admitting it and the Court of Appeals upheld his ruling. The copy of the Joint Administrators' Amended Reply delivered to counsel for the Defendant Mrs. Smith, had been altered by removal of the original printed pages numbered "10" through "33," so that it consisted of only 152 pages, with a carbon copy of the Circuit Court Clerk's Certificate and Attestation pasted on the back sheet. It is evident the original reply as printed, totaled 174 printed pages. A piece of paper was pasted over the top portion of page 34 and the number "10" affixed thereto; thereafter all pages were renumbered in ink from "35" through "174," to read "11" to "152." Was it intended that the missing 22 pages not be seen by Mrs. Smith only? or by the Court? or by both?

6. The District Court Erred In Granting The Plaintiffs' Joint Administrators' (First) Motion For Summary Judgment As To The Defendant's Original Answer And Counterclaim.

The District Court erred in granting the plaintiffs Joint Administrators first motion for summary judgment as to

Mrs. Smith's original answer and counterclaim. This motion, as finally amended, on September 8, 1959, and the Court's ruling thereon, were based on the theory that the issues raised by the original counterclaim are barred by (1) the Statute of Limitations and (2) the rule of res judicata.

In the brief, filed in the Court of Appeals under paragraphs Roman Numerals III and V, we clearly showed that the issues raised by Mrs. Smith's original answer and counterclaim, are neither barred by the Statute of Limitations nor the application of the rule of res judicata. This is fully supported by the "Affidavit of Patricia O'Brien-Smith in Opposition to 'Plaintiff's Joint Administrators' Motion for Summary Judgment' and Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's (original answer and) Counterclaim," filed March 21, 1957. (R. I—342a-388a); also "*Supplemental Affidavit of Patricia O'Brien-Smith in Opposition to 'Plaintiffs' Joint Administrators' Motion for a Summary Judgment'*"; and "Second Response to the 'Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim filed Herein November 12, 1956,'" tendered on August 27, 1959, *with 35 exhibits attached thereto, and filed in the within action pursuant to order of the District Court on August 28, 1959.* (R. I—472a-1279a)

In addition, plaintiffs Joint Administrators' original motion for summary judgment as to the counterclaim raised only the theory of the Statute of Limitations. *Mrs. Smith objected to an amended motion (R. II—1565a) which, for the first time, raised the additional theory of res judicata.* Thus, the same reasons set forth in paragraph VI, *supra*, as error in granting plaintiffs' motion for leave to file an amended reply, belatedly allowing them to raise the res judicata question for the first time, are extended here as

error in granting the plaintiffs' amended motion for summary judgment, as to that portion concerning the question of res judicata.

7. The District Court And The Court of Appeals Rulings Violated KS 1067, Which Is Now KRS 25.200, And Rule 15 Of The Federal Rules of Civil Procedure In Denying Mrs. Smith's Motion For Leave To File Her First Amended Answer And Her First Amended Counterclaim, Surcharging The Joint Administrators Settlements Of Accounts—And On Bond Of The Estate Of John A. O'Brien, Which Is Provided For Under KS 1067, Now KRS 25.200.

The District Court and the Court of Appeals Rulings violated KRS 25.200 and Rule 15 of the Federal Rules of Civil Procedure in denying "Mrs. Smith's Motion For Leave To File Her First Amended Answer and (Her First) Amended Counterclaim, Surcharging The Joint Administrators So-called Final Settlements Of The Accounts—and On Bond of the Estate of John A. O'Brien," which "settlements" were filed by the Joint Administrators in the Jefferson County Court at Louisville, Kentucky, on June 21, 1950, January 7, 1952 and August 7, 1952. (R. I—164a-330a) Such denial was in violation of KRS 25.200.

In the opinion of the District Court rendered in the within action on March 4, 1961 (which was fully upheld by the Court of Appeals), (R. II—1607a-1628a) it held that:

A. "It is axiomatic that the District Courts of the United States in such Districts as this have no jurisdiction over probate matters."

B. "That the right of the defendant (Petitioner Mrs. Smith) to surcharge the Joint Administrators settlement of accounts depended upon whether the set-

tlement of accounts filed was a final account which it was so labeled."

(He did . rule if it was a final settlement of accounts or not) and we contend it was not.

(1) "Whether the defendant (Petitioner Mrs. Smith) took part in the proceedings in connection with the settlement of that account as required by the Kentucky Statutes." (R. II—1616a-1618a)

(2) "That she (Petitioner Mrs. Smith) took all possible steps to prevent the settlement of the account . . . It would appear that she had no objections to such accounting, as such."

(3) "It appears from the record that the defendant (Petitioner Mrs. Smith) participated to a substantial extent, in the proceeding leading to approval of the final account, by using every remedy available to prevent the consideration and determination of the final account filed by the plaintiffs-administrators" (the two Trust Companies). (R. II—1619a-1620a)

(4) "That the defendant (Petitioner Mrs. Smith) took part in and participated in the settlement of the final account within the meaning of the Kentucky Law."

C. "That her (Mrs. Smith's) remedy was by appeal to the Jefferson Circuit Court, from the Judgment of March 5, 1952, and the amended Judgment of May 1, 1952, of the Jefferson County Court, and that 'It is not for this Court (District Court) at this time to review the findings of the County Court of Jefferson County.'" . . . (R. II—1620a-1629a) (The District Court did not state when the court should review the findings.)

Yet, the District Court admitted that Mrs. Smith did not file any exceptions and stated: (R. II—1618a)

> *"That she (Mrs. Smith) did not file any actual exceptions challenging the propriety of the accounting*

for receipts and disbursements or the actions of the administrators as set forth in the final account.''

8. The District Court Erred And The Court Of Appeals Upheld His Ruling In Holding That The United States District Courts Have No Jurisdiction Over Probate Matters.

The District Court erred and the Court of Appeals upheld his Ruling when it held that it is axiomatic that the District Courts of the United States in such districts as this, have no jurisdiction over probate matters. (R. II—1616a-1617a)

The cases cited by the District Court in its opinions and upheld by the Court of Appeals are to be distinguished and in no way abrogate the established rule of a long line of Federal decisions that a Federal Court sitting in a state, whereby the law of said state equity courts of general jurisdiction have concurrent or superior jurisdiction with the County Court having probate jurisdiction, to entertain an independent suit ''inter partes'' involving a like subject matter, then the Federal Court also has jurisdiction.

We are fully upheld in this contention by the case of *First National Bank & Trust Company, Guardian for Marie Therese Corby, Plaintiff* v. *Madeline Corby Morgan Webber, etc., Defendants*, filed in the District Court of the United States for the Eastern District of Kentucky at Covington, February 7, 1934.

In a motion to remand the above styled case, counsel for the plaintiff moved to remand this case to the Kenton Circuit Court because of lack of jurisdiction in the Federal Court, wherein Judge Cochran said:

> ''We have no probate courts in Kentucky. We have County Courts which have probate jurisdiction which they have is of a very limited character. They have

power to probate wills, to appoint and remove personal representatives and guardians and to state their accounts which is called a settlement thereof. This is all the power they have. They do not have possession of the estates or jurisdiction of the res. They do not have power to make orders as to the handling by personal representatives or guardians of the estates in their hands or as to their disposition or distribution. The personal representatives and guardians handle, dispose of and distribute the estates in their hands as the law requires them to do, and after they have so done they go before the county judge and state or settle their accounts and his action may be carried by exceptions to the county court and circuit court and Court of Appeals.

By express provisions of the Civil Code of Practice of Kentucky the circuit courts of the state are given jurisdiction of suits against personal representatives and guardians for the jurisdiction of the Courts of this State."

There were other arguments involved, but on March 30, 1934, Judge A. M. J. Cochran, Judge for the Eastern District of Kentucky, gave the following opinion in overruling the motion to remand:

"*There is no conceivable reason, requisite diversity of citizenship existing and amount in controversy being sufficient, why such a suit cannot be brought originally in this court or if brought in the state circuit court why it may not be removed to this court.* If there is an action or suit which can be brought in the state circuit court, of which this court does not have jurisdiction, original or on removal, if diversity of citizenship exists and the amount in controversy is sufficient it does not occur to me. I do not find it necessary to go into the authorities on the question. The lack of any authority exactly in point is due to the fact that in many, if not most of the jurisdictions of this country, there are probate courts with the powers and jurisdiction heretofore stated. *Decisions that federal*

jurisdiction does not exist of probate matters and to the effect that in such jurisdictions the federal courts have jurisdiction to determine the rights of the parties, but no more, are indirect authorities in support of the position here taken. Those decisions are based on the ground that the probate courts have jurisdiction of the res. As we have no probate courts and as such probate jurisdiction as county courts have is of the limited character above pointed out, it necessarily follows that the federal courts in this state have full jurisdiction of the settlement of the accounts of personal representatives and the disposition and distribution of the estates in their hands. *In exercising such jurisdiction, they do not invade the exclusive jurisdiction of any state court.* The motion to remand is overruled."

In the case of *Griffith* v. *Bank of New York*, 147 Fed. (2d) 899, February 16, 1945, which is applicable to the instant case, it held:

"Though the settlement thus envisaged has been fully consummated, *plaintiff now alleges that her consent was obtained by duress and that she has been damaged by the duress practiced upon her. Acts constituting the duress are alleged to be defendant's (the Two Trust Companies here) willful withholding of principal and income of the estate, initiation of unnecessary and expensive litigation exhausting this plaintiff (Defendant-Petitioner here) and her co-beneficiary financially* (referring to the action for construction of the will which resulted in a decree sustaining the validity of the trust, *Bank of New York* v. *Kaufman*, Sup. 26 N.Y.S. 2d 474, affirmed 261 App. Div. 898, 26 N.Y.S. 2d 316; 285 N.Y. 854, 33 N.E. 2d 566), *and threatened additional unfair and oppressive expense of litigation and withholding of the estate, coupled with refusal of information as to the trustee's conduct of the trust, bringing plaintiff to 'a point of discouragement and despair' and fear of loss of her estate, so that she was not in a position to contract freely or negotiate a fair settlement with defendant.*"

"For it is well settled that the federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court judgment obtained by fraud. Marshall v. *Holmes,* 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. And though it was once thought necessary that such fraud be extrinsic, so that it could not have been considered in the original action. *United States* v. *Throckmorton,* 98 U.S. 61, 25 L. Ed. 93, the later cases no longer seem to adhere strictly to even his limitation. Marshall v. Holmes, supra; *Publicker* v. *Shallcross,* 3 Cir., 106 F. 2d 949, 125 A.L.R. 386, certiorari denied 308 U.S. 624, 60 S.Ct. 379, 84 L. Ed. 521; cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U.S. 238, 245, 246, 64 S.Ct. 997."

"(2) But putting aside the unsettled question whether cases such as those of Holmes and Publicker definitely mark the elimination of the Throckmorton restriction, cf. *Graver* v. *Faurot,* 162 U.S. 435, 16 S.Ct. 799, 40 L. Ed. 1030, *the District Court erred because the duress or fraud here involved was, as alleged, sufficient to have warranted a chancellor in disregarding or setting aside the prior judgment. Since the consent to that judgment is alleged to have been procured by the trustee's threat to tie up the property indefinitely unless settlement was made, this case is substantially identical with Ingram* v. *Lewis,* 10 Cir., 37 F. 2d 259, 70 A.L.R. 702, certiorari denied 282 U.S. 842, 51 S.Ct. 22, 75 L. Ed. 747, where a judgment of dismissal of an action for an accounting was disregarded by the federal court, since such dismissal was based on a release obtained by the trustee on threat of withholding the property. See also *Park* v. *Parl,* 5 Cir. 123 F. 2d 370; *Seay* v. *Hawkins* 8 Cir., 17 F. 2d 710; *Jefferson* v. *Gypsy Oil Co.,* 8 Cir., 27 F. 2d 304; *Horton* v. *Stegmyer,* 8 Cir., 175 F. 756, 758, 20 Ann. Cas. 1134."

"Though the court in the Ingram case, supra, did not in so many words classify the case as one of 'extrinsic' fraud, both the situation there presented and the one before us seem clearly to be so characterized if we are bound to hold the powers of a court

of equity thus restricted. *For the very duress by which the release or consent is obtained also prevents the coerced party from challenging before or at trial the statement or conduct of its adversary.* Thus in the original action the issue of duress never is before the court. *Indeed, the case differs little, if at all, from those where a witness is forcibly prevented from testifying, or an attorney is bribed to fight a losing battle or give his client false advice.*"

". . . We think, therefore, that no sufficient ground for dismissal of this action has been shown. Of course, we do not pass upon the existence of actual duress or coercion; that cannot be decided upon the mere face of the complaint."

"Reversed and remanded."

The above cited *Griffith* case clearly holds that the United States District Courts have jurisdiction and have assumed jurisdiction of probate matters similar to the instant case in similar jurisdictions throughout the United States. *The above cited case is definitely in point with the instant case, which is one of "extrinsic" fraud, and is almost identical with the kind of misrepresentation, duress, and coercion imposed upon Mrs. Smith. and it is clearly shown that Mrs. Smith's attorneys, and the Joint Administrators' attorneys who were also her attorneys, gave her false advice.*

See the cases of *Rogers* v. *Girard Trust Co.*, 159 F. 2d 239, (1947); and *Meredith* v. *City of Winter Haven*, 320 U.S. 228; 64 S.Ct. 7, at page 11, (1943), which are directly in point with the instant case.

The theory that the District Court did not have probate jurisdiction to consider the "defendant Mrs. Smith's amended answer and amended counterclaim" is groundless. The District Court's statement and ruling on page three (3) (which the Court of Appeals upheld) of the Opinion that the Joint Administrators objection to "Mrs. Smith's motion

for leave to file an amended answer and amended counterclaim'' in the within action should be sustained, is without any legal basis.

If the District Court has no probate jurisdiction to consider the ''Defendant Petitioner's amended answer and amended counterclaim'' (tendered in the District Court on February 23, 1957), then the District Court had no jurisdiction to consider the ''Order and Judgment,'' of March 5, 1952 and amended on May 1, 1952 of the Judge of the Jefferson County Court of Louisville, Kentucky, in favor of the Joint Administrators and their attorneys on a matter for the Joint Administrators' which is definitely a probate matter, to wit: (The two Trust Companies) ''Their purported Final Settlement of Accounts for the Estate of John A. O'Brien, deceased.'' How then could the District Court determine the accuracy of the different lawyers' fees for their different law suits filed in probate matters in the final settlement of the O'Brien estate if the court does not go into all phases of the probate matters?

All of the fees in the sum of $73,756.98 that the District Court awarded to the Joint Administrators, and all of the fees for their attorneys and law firms, which the Court of Appeals upheld is definitely a probate matter.

The law firms of Bruce & Bullitt; Bullitt, Middleton, Seelbach & Milner, and *Bullitt, Dawson & Tarrant, have been awarded three separate law fees for prosecuting trumped-up law suits in the estate of John A. O'Brien, deceased, since 1937,* a period of twenty-six years, all of which grew out of purported settlements of the said estate, and were all in a probate matter. *All of the law firms were employed by the Joint Administrators to delay for the Joint Administrators their filing of a final settlemet of the estate of John A. O'Brien, deceased, in the Jefferson County Court for 27 years, as we have clearly shown.*

The District Court stated on page 3 of its opinion that "Reference to previous litigations will be made only when it is pertinent to the determination of the motions before the Court in this case." No reference was ever made.

Also, the District Court set up on pages 2, 3 and 4 of its opinion, all of the law suits that have been filed and prosecuted in the estate of John A. O'Brien, deceased, and devoted three and one-half pages, single-spaced, to enumerating them as though that would be legal grounds for awarding the lawyers' fees to them. And the Court of Appeals accepted the District Court's findings of facts in his opinion. *It must be remembered that it was the joint Administrators who filed and caused to be filed all of those law suits except two, and the law suits are set up in detail, in Mrs. Smith's petition for rehearing on the District Court's opinion.* (R. II—1661a-1667a) Appendix C hereto.

Why should the estate of John A. O'Brien and Mrs. O'Brien-Smith pay for law suits none of which were for the benefit of the estate, filed by two Trust Companies the joint administrators over a period of twenty-eight years in order to keep from filing a final settlement of the accounts of the O'Brien estate and to cover up their acts of fraud in the sale of the partnership interest owned by Mrs. Smith, and their other acts of fraud. The record of this case shows that the Joint Administrators were in contempt of Court in defying both the Rulings of the Court of Appeals of Kentucky of June 8, 1948 supra and of the Jefferson County Court of February 24, 1949 in refusing to file a final settlement of their accounts of the O'Brien estate, for over fourteen years, and then they only filed a partial settlement on June 21, 1950.

The District Court and the Court of Appeals upheld his ruling violated KRS—in holding that Mrs. Smith is precluded from surcharging the Joint Administrators three

settlements of accounts of the Estate of John A. O'Brien filed in the Jefferson County Court on June 21, 1950, January 7, 1952 and August 7, 1952

The District Court admitted that there are two ways to challenge the final settlement of the accounts of an estate filed in the County Courts of Kentucky, and cited section 413.120 of the Kentucky Revised Statutes (Opinion R. II—1619a), which does not apply, and the District Court does not state correctly what the two ways are to challenge the final settlement of the accounts; neither the statute cited or the cases cited by the District Court thereunder sustain his statements thereunder. They do not hold that "It must be done by appeal if the person challenging has taken part in the proceeding leading to the approval of the account." They do not hold that "If the challenging party has not participated in the proceeding leading to the Judgment settling the final account, then the account may be surcharged at any time within five years in an appropriate action."

The Kentucky law is crystal clear on this subject and the two ways to challenge the final settlement of the accounts of an Estate by an Administrator are:

> **1. The party feeling aggrieved by the settlement of the executor's account may file exceptions and appeal to circuit court from county court's action thereon, or,**
>
> **2. The party may let the settlement be confirmed and approved by the county court without written exceptions and file an action in circuit court to surcharge the settlement on ground of error, mistake or fraud, within five years,**
>
> **as held in the case of Dees' Adm'r v. Dees' Ex'r et al, 249 Ky. 650, 61 S.W. (2d) 301-302 (Court of Appeals of Kentucky June 6, 1933). Also see Harper v. Lamb,**

Ballantine et al v. Harper et al., 202 Ky. 771, 261 S. W. 280-282 (Court of Appeals of Kentucky April 25, 1924). Scott's Heirs v. Kennedy's Executor, 12 B.M., 515; Stanbury's Admr. v. Robinson, 16 Ky. Law Rep. 310.

We are also supported in our contentions by the case of *Turley's Administrator* v. *Barnes, etc.,* 103 Ky. 127, 44 SW 446, 19 KLR (1808), which states:

"1. SETTLEMENTS OF FIDUCIARIES IN COUNTY COURTS—APPEALS FROM—EQUITY JURISDICTION.—**No appeal lies from an order of the county court confirming a settlement with a fiduciary where no formal written exceptions were filed to the settlement, such order not being a final order; and the fiduciary may thereafter bring his equitable action in the circuit court to surcharge and correct the errors in that settlement.**"

"2. Settlement by county courts of the accounts of fiduciaries are only prima facie, and may be surcharged in chancery by proper proceedings and purged of all errors where they were not contested in the county court. **Scott's Heirs v. Kennedy's Executor, 12 B.M., 516; Frazier v. Kavanaugh, Administrator, 4 Ky. Law Rep. 712; Bell v. Henshaw's Executor, 12 Ky. Law Rep. 674.**

By the provisions of **article 5, chapter 35, Kentucky Statutes,** the county judge is authorized to make settlements with personal representatives, and he is directed to make a report, in writing, of such settlement showing each item of debit and credit and the general result of all the evidence heard and vouchers **filed to the county court at its next regular term and noted of record, and section 1067 provides that this report shall lay over one term for exceptions to be filed by any person interested**; that if no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded; that if exceptions are taken, other evidence besides that reported may be heard,

and the court shall upon the whole case reject, alter or confirm the report, and if confirmed order it to be recorded; that any new evidence given in court must be reduced to writing and filed with the report; and that settlements so made shall be prima facie evidence between the parties.

In passing upon the question as to whether an order of a county court confirming a settlement, where no exception had been filed, was such a final judgment or order as to be the proper subject of revision and reversal by this court on any ground, this court, in the case of **Scott's Heirs v. Kennedy's Executor, 12 B.M., 515, said:**

'There is in such a case no judicial contest and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than of a judicial act. Second. There is no final adjudication or determination in favor of one person or against another or upon any question of property or personal rights. Third. The settlement and its confirmation are not conclusive, either upon the parties who may have been interested in opposing it or upon the court itself, which may order another settlement, in which errors in the first may be corrected. Fourth. **It is not conclusive, in any other court, but is only prima facie evidence, subject to be surcharged and falsified,** and may operate rather as a means of preserving evidence, and the preservation of which executors or other fiduciaries are entitled, than as a judgment; and being made by officers under the supervision of the court, it ought to have, and **has always had the effect of prima facie evidence, but can always** be questioned upon its merits by a bill in chancery.'

Also see the cases of *Scott's Heirs* v. *Kennedy's Ex'r, etc.*, 12 B. M. 510; 51 Ky. 510-517, 4 KLR 712 (1849); *Brady* v. *Cooper,* 12 Ky. Law Rep. 420 (1890); *Caplinger* v. *Pritchard,* 136 Ky. 349; 124 S.W. 352; *Andrews et al.* v. *McCarthy et al.,* 208 Ky. 25; 270 S.W. 466 (1925).

The statutes provide and the cases hold that unless written exceptions are filed in the county court to the final settlement of accounts of an estate by an administrator, that the party feeling aggrieved by the settlement of accounts cannot appeal to the circuit court. *When no written exceptions are filed in the County Court, courts of Kentucky* there is no Contest, the Court records the settlement as prima facie evidence of said settlement.

After the settlement is confirmed and approved, by the Judge of the county court without written exceptions, the aggrieved party may file an action in the circuit court to surcharge the final settlement of accounts on the ground of error and fraud, and force the administrators to account for what they owe the estate and the beneficiary thereunder.

The District Court and the Court of Appeals and the joint administrators admitted that Mrs. Smith did not file any written exceptions in county court. There is no proof in the record in the within case, that Mrs. Smith took any steps to prevent the Joint Administrators from filing a final settlement of their accounts of the Estate of John A. O'Brien because *the Court of Appeals had already ruled four times in favor of Mrs. Smith, and had ordered and directed the Joint Administrators to file a final settlement of the O'Brien Estate in the Jefferson County Court, at Louisville, Kentucky.*

Two of the Judges of the Jefferson County Court had already ruled in favor of Mrs. Smith, and ordered and directed the Joint Administrators to file a final settlement of the O'Brien Estate in County Court. The Joint Administrator had defied the six rulings of the Courts of Kentucky from March 1, 1936, until June 21, 1950, and refused to file a final settlement of their accounts of the O'Brien Estate until after all of the records in the O'Brien Estate from

March 1, 1934 through May 26, 1949, which had been filed in the office of the Clerk of the County Court were lost, stolen or missing. Then the Joint Administrators were anxious to proceed with hearings in the County Court on their so-called final settlement filed in the County Court, on June 21, 1950, which was not, and is not a final settlement under Kentucky law.

The District Court erred and the Court of Appeals upheld his ruling in holding that the defendant (Mrs. Smith) participated in the proceeding leading to the approval of the final settlement of the accounts of the Joint Administrators in the Jefferson County Court. There is no evidence in the record of the within action to uphold these findings. The decision in the Mandamus action in the Court of Appeals of Kentucky cited by the District Court and the Court of Appeals in their opinions and the excerpts therefrom (Opinion R. II—1620a-1622a) fully uphold Mrs. Smith in her contentions that the Joint Administrators settlement of accounts could not be a final settlement of accounts *for two reasons as long as (1) the Joint Administrators second settlement suit of the O'Brien Estate, was pending in the Jefferson Circuit Court and (2) as long as the Joint Administrators appeal was pending in the Jefferson Circuit Court from the "Rule Issued" against them in the Jefferson County Court, to file a final settlement of the O'Brien Estate. The said Opinion of the Court of Appeals of Kentucky does not uphold the District Court's ruling that Mrs. Smith is barred from surcharging the so-called final settlements of accounts of the Joint Administrators of the O'Brien Estate* filed in the Jefferson County Court on June 21, 1950, January 7, 1952 and August 7, 1952.

The District Court erred and the Court of Appeals upheld his ruling, in his statement that Mrs. Smith "took all

possible steps to prevent the settlement of the accounts filed by the Joint Administrators." **Mrs. Smith objected to the Joint Administrators having hearings on their so-called final settlement of the accounts of the estate of John A. O'Brien in the Jefferson County Court, until the records were legally restored, because all the records in the estate of John A. O'Brien filed by the Joint Administrators and counsel for Mrs. Smith, in the Jefferson County Court from March 1934, through May 26, 1949, were still missing and had not been legally restored and they were not restored until October 1954,** and **the Joint Administrators second settlement suit filed in the Jefferson Circuit Court on March 31, 1949,** and **an appeal from a "Rule Issued" against the Joint Administrators in the Jefferson County Court requiring them to file a final settlement of their accounts of the O'Brien Estate** in the Jefferson County Court, **from which the Joint Administrators filed an appeal in the Jefferson Circuit Court on May 26, 1949, were both still pending in the Courts of Kentucky.** *Any steps which Mrs. Smith would have taken until the above two cases were disposed of, would have been void, and she wanted to prevent the Joint Administrators from having further trumped-up hearings and wasting her cash held by them, and she was upheld in her contentions by the opinion in the Mandamus action in the Court of Appeals of Kentucky* in the case of *Smith v. Shamburger, Judge,* 314 Ky. 850, 238 S.W. (2d) 844 (1951), wherein in effect *it held that as long as the second settlement suit filed by the Joint Administrators, in the Jefferson Circuit Court, and their second appeal filed in the Jefferson Circuit Court were pending, that the accounting which the Joint Administrators had filed on June 21, 1950, was not and could not be a final settlement of the accounts of the estate of John A. O'Brien.* The Opinion of the Court of Appeals of Kentucky in the Madamus pro-

ceedings of *Smith* v. *Shamburger, Judge,* 314 Ky. 850; 238 S.W. 2d 844; stated that:

> "In petitioner's argument in her (Mrs. Smith's) briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court: (1) *A settlement suit, filed March 31, 1949, and* (2) *an appeal from the County Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former Judge of Jefferson County Court, directing the Co-Administrators to settle the estate. There has been no final disposition of either of these cases.*"
>
> "*If those items now the subject of controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting (Joint Administrators) would have been a final settlement.*"

We invite this Court to examine the Printed Transcript of Record of the within action. Mrs. Smith's Exhibits No. 32 and No. 33 (R. I page 678a through 1092a), which is a complete copy of a Certified Copy of the Transcript of Record in the Estate of John A. O'Brien, No. 24,146 from the office of the Clerk of the Jefferson County Court at Louisville, Kentucky from January 24, 1934, through October 1, 1951 *(after the records were legally restored in 1954),* which were filed by the order of the District Court in the within action on August 28, 1959.

The District Court admits and states that the defendant-petitioner (Mrs. Smith) did not file any exceptions to the so-called final settlement of the accounts of the Estate of John A. O'Brien filed by the Joint Administrators on June 21, 1950 in the Jefferson County Court (Opinion R. II—1618a) and further stated that "It would appear that she had no objections to such accounting, as such." His statement and rulings are inconsistent.

The District Court and the Court of Appeals approved the Joint Administrators settlement of the accounts of the O'Brien Estate in their "Exhibit No. 1" to their Complaint (R. I—46a-91a), *but denied Mrs. Smith the right to file the Joint Administrators' "Receipts and Disbursements" in the O'Brien Estate, which were filed with the Joint Administrators' settlement of accounts in the County Court as their Exhibit "A" on June 21, 1950, January 7, 1952 and August 7, 1952, all three of which were tendered with Mrs. Smith's First Amended Answer and her First Amended Counterclaim in the within action, as her Exhibits "D," "E" and "F," on February 23, 1957.* (R. I—233a-329a)

In the first amended answer and first amended counterclaim, *Mrs. Smith surcharged 221 specific items of disbursements, which the Joint Administrators improperly charged the O'Brien Estate,* in addition to the market value of her interest in the O'Brien Company and its four subsidiaries, as set forth on pages 164a-330a, Volume I, Printed Transcript of Record, filed as Appendix B hereto.

9. The District Court And The Court Of Appeals Upheld His Ruling On An Important Question Of Kentucky Law, In A Way In Conflict With Applicable Kentucky Decisions, And In Violation Of Kentucky Statutes.

The District Court and the Court of Appeals upheld his ruling in holding that Mrs. Smith should have filed an appeal from the "Order and Judgment" of the Judge of the Jefferson County Court of March 5, 1952, and amended May 1, 1952, and that the Joint Administrators and their attorneys are now entitled to a final judgment for the fees awarded them on March 5, 1952 and the amended Judgment of May 1, 1952, *without a trial of this case, and rul-*

ing that Mrs. Smith cannot now be permitted to challenge this settlement in this action. (R. II—1627a-1629a)

We have clearly shown that the defendant-petitioner, Mrs. Smith, could not legally appeal from the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and amended on May 1, 1952, to the Jefferson Circuit Court, for the reasons set forth herein, and in which she is upheld in her contentions in the cases cited thereunder. *The Judgment and amended Judgment were only prima facie evidence subject to be surcharged and falsified in the Jefferson Circuit Court within five years, from the date the final settlement of accounts was approved by the County Judge of the County Court on March 5, and May 1, 1952,* to-wit until May 1, 1957.

Mrs. Smith filed her motion for leave to file her first amended answer and her first amended counterclaim in the within action on February 23, 1957, and tendered therewith the said amended answer and amended counterclaim and Exhibits "A" through "G." (R. I—165a-330a) By affirming the District Court's denial of Petitioner's Motion, the Court of Appeals sanctioned a radical departure from accepted standards of judicial procedure.

The law is well settled in Kentucky that no appeal lies from an order of the County Court confirming a settlement with an administrator where no formal written exceptions were filed to the settlement in County Court, such order not being a final order. We are supported in this contention by the case of *Stanberry's Admr.* v. *Robinson*, 16 Ky. Law Rep. 310, which states:

> "This court again reviewed this question, referring to the case, supra, and held that the order approving the report of settlement made by the county judge and ordering it to be recorded, was not a final order.

"In the case at bar, no formal written exceptions were filed to the report made by the judge to the county court of his settlement with appellant, nor was there any contest made in that court as to the validity of the charges complained of, or any judgment rendered passing upon the rights of the parties with reference thereto. And, while we think it clear that if a party in interest shall file written exceptions to a settlement made by a fiduciary, and these exceptions are regularly tried by the county court upon their merits and a judgment entered sustaining or overruling them, the proper remedy to a party who feels aggrieved is by appeal as provided in section 978 (Kentucky Statutes Section); yet we do not think that the effect of that statute is to take away from parties who do not file such exceptions or in any way contest in the county court the validity of charges complained of, the right to have such alleged errors reviewed, by a bill in chancery.

"The mere formal entry of the order of confirmation of the settlement, no exceptions having been filed thereto, was not a final judgment conclusive of the rights of the parties from which appeal could be taken, and which precludes appellant from bringing his suit to surcharge and correct the alleged errors in the settlement and to restrain the prosecution of suits for the collection of the balance found to be due by the heirs growing out of such errors."

Nor was said "Judgment" a final order, but only prima facie evidence of the settlement as filed. *Brady* v. *Cooper*, 12 Ky. Law Rep. 420, p. 420 (1890):

"Upon the revision of our statutes county court settlements, made with fiduciaries, were declared to be only prima facie evidence . . ." and where (at page 421) "no exceptions appearing to have been filed by any one, such a settlement is only prima facie correct, even though the parties had notice, and it is not a final adjudication of the rights of the parties, and those

> complaining have the right, by original bill, to surcharge the settlement."

The Statute referred to in the above case was K.S. 1067, and is now within the purview of KRS 25.200, which specifically declares such settlements to be only *prima facie* evidence of their correctness. See also the case of *Andrews et al.* v. *McCarthy et al.*, 208 Ky. 25, 270 S.W. 466, p. 468 (1925); which said:

> "Such settlements are only prima facie evidence subject to surcharge, and they operate rather as a means of preserving evidence. *Scott's Heirs* v. *Kennedy*, 12 B.Mon. 510; *Bell* v. *Henshaw*, 12 Ky. Law Rep. 674; *Turley* v. *Barnes*, 103 Ky. 127, 44 S.W. 446, 19 Ky. Law Rep. 1808; *Caplinger* v. *Pritchard*, 136 Ky. 349, 124 S.W. 352."

Thus, the order of the Jefferson County Court of March 5, 1952, as amended May 1, 1952, could not have been appealed from to the Jefferson Circuit Court since no written exceptions were filed, by Mrs. Smith, but could only be subject to an action to surcharge and falsify as provided by Kentucky Statutes and Kentucky law, and the Kentucky Statutes cited herein, which the Petitioner was denied the right to do by the District Court which was upheld by the Court of Appeals.

It has been consistently held that County Courts, in Kentucky have no jurisdiction to entertain an action or enter a judgment for a recovery of money. This jurisdiction is vested in the Circuit Court, quarterly courts, police and magistrates courts. See *Wheedon's Adm'r* v. *Barrett's Guardian et al.*, 253 Ky. 737; 70 S.W. (2d); *Brady* v. *Brannon*, 134 Ky. 769; 121 S.W. 679, 680; *Central Trust Co., etc.* v. *Bennett*, 208 Ky. 281, 270 S.W. 821; also see the case of *Commonwealth* v. *Central Consumers Co.*, 91 S.W. 711.

The county courts in Kentucky, acting in probate matters are without jurisdiction to render a judgment for a recovery of money. A county court's jurisdiction is limited to an audit and determination of whether proper settlement has been made.

Let's be practical and at the same time adhere to the Statutes and laws of Kentucky. No statute or law in Kentucky can be found giving the county court jurisdiction to render a personal judgment for the recovery of more than $73,000.00 in fees, or in any sum. The Joint Administrators knew and were fully cognizant that they did not have a "final judgment." They, the attorneys for the Joint Administrators know how to collect a judgment, if they have a judgment. KRS 426.035 provides that "execution may be issued upon a judgment at any time until the collection of it is barred by The Statute of Limitations." Rule 69 of the Rules of Civil Procedure provide that process to enforce a judgment for the payment of money is by a writ of execution. Their remedy of recovery on a "Final" Judgment in Kentucky is clear and unequivocal. The so-called final judgment was March 5, 1952, the Defendant Mrs. Smith was solvent, yet on September 13, 1956, the Joint Administrators filed the within action in the Jefferson Circuit Court, which action simply amounts to a third settlement suit, and is the third settlement suit filed by them in the O'Brien Estate.

Why, if the two Trust Companies had a "final" judgment, did they file another settlement suit in Circuit Court, when all they would have had to do was issue a writ of execution on the judgment?

Again, the Joint Administrators were fully aware they did not have a "final judgment" within the meaning attributed to it by the District Court and the Court of Ap-

peals in granting Summary Judgments. Thus, the District Court rendered arbitrarily and summarily, a final judgment in this, the third original settlement suit of the O'Brien Estate, without a trial of the case, and the decision so rendered should have been reversed, and the Court of Appeals should have reversed it.

The District Court disregarded all of the facts which were briefed in this case, and *when the Joint Administrators and their attorneys spent ten or more days in the Jefferson County Court before a special Commissioner in July 1951, in December 1951, and January and February 1952, introducing records and testimony and obtaining the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and of May 1, 1952, there were no records in the estate of John A. O'Brien, deceased, to prove or disprove anything which the Joint Administrators were contending.* The above reasons set forth are why Mrs. Smith did not file any exceptions to any item in the Joint Administrators' so-called final settlement of accounts, because it was not and is not a final settlement of the accounts of the estate, even to this day, and beause *the records in the O'Brien Estate were not legally restored by the Court of Appeals of Kentucky until 1954.*

The hearings in the Jefferson County Court by the Joint Administrators, without Mrs. Smith or her attorney being present, amounted to nothing more than a Kankaroo Court Hearing, which the Joint Administrators had printed in one volume of 232 pages *which was not filed in the Record of this action in either Court.*

Mrs. Smith has proven that the only objections that she filed in the proceedings in the Jefferson County Court, and the only appearance made for her during that time, were the objections to the County Court Judge proceeding with

the hearings in the estate in July 1951, December 1951, and January and February 1952, for the above reasons and to save the O'Brien estate further expense when all of the records in the estate of John A. O'Brien from January 1, 1934, through June 2, 1949, were still missing. When the Joint Administrators gave bond and had the clerk of the Jefferson Circuit Court to issue a supersedeas on Judge Horace M. Barker, the then presiding Judge of the Jefferson County Court, the supersedeas was issued at the request of the Joint Administrators and their attorneys and their names are endorsed thereon by their attorneys, R. Lee Blackwell and Irvin Marcus, (see Defendant's Exhibit "G," filed in the District Court on August 28, 1959) by order of the Court. (R. I—329a-330a)

The District Court violated Rule 15 of the Federal Rules of Civil Procedure and the Court of Appeals upheld his rulings in overruling the defendant's (Mrs. Smith's) motion for leave to file her first amended answer and amended counterclaim, and stated that the amendment asserted no claims or defense cognizable by the Court in which the case is pending.

We have clearly shown that *Mrs. Smith could not have appealed to the Circuit Court since she did not file any exceptions to the final settlement of accounts in the Jefferson County Court, and that her only remedy was to surcharge and falsify the final settlements of accounts, which were approved by the Jefferson County Court on March 5, 1952, and amended Judgment May 1, 1952, thus becoming prima facie evidence of a settlement.*

The District Court erred and the Court of Appeals upheld his rulings in granting the Joint Administrators Motions for Summary Judgments as to the Defendant Mrs. Smith's original counterclaim, and the order entered thereon on April 20, 1961. (R. II—1696a)

The District Court is in error, and the Court of Appeals upheld his ruling *the Joint Administrators were not discharged and released from further liability under their bonds, in the amended Judgment of May 1, 1952, filed in the Jefferson County Court.* (R. I—34a-35a), in the O'Brien Estate.

10. The District Court Violated Rule 15 Of The Federal Rules of Civil Procedure and the Court of Appeals Upheld His Ruling In Denying The Defendant-Petitioner Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer And Her Second Amended Counterclaim, Filed On May 15, 1961.

On May 15, 1961, Mrs. O'Brien-Smith filed a motion for leave to file her second amended answer and her second amended counterclaim. The District Court did not rule on this motion until on November 9, 1962, when he then ruled that the proposed amendment does not avoid the prior ruling of the District Court, meaning the opinion, rendered on March 4, 1961, and his order thereon filed and entered in the within action on April 20, 1961. (R. II—1607a-1629a; 1696a)

The cases cited by the District Court at the hearing on November 9, 1962, (R. II—2168a-2172a) do not sustain his ruling thereon, which the Court of Appeals affirmed, because in the within case, *the District Court did not permit Mrs. O'Brien-Smith to file a single amendment to her original answer and her original counterclaim, and her second amendment which was tendered for filing was tendered on May 15, 1961,* and the Court did not rule on said motion until on November 9, 1962. Thus, the *second amendment was tendered one year and six months before the District Court ruled on it,* and granted the Joint Administrators' "Second Motion for Summary Judgments," on November 9, 1962. (R. II—2090a-2093a)

The photostatic copies of certified copies of the Defendant-Petitioner Mrs. O'Brien-Smith's Exhibits No. 42 through 75, (except Exhibit No. 51) which were attached to "Mrs. O'Brien-Smith's Second Amended Answer And Her Second Amended Counterclaim," which were tendered with *"Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer And Her Second Amended Counterclaim," filed in the within action on May 15, 1961, were of vital importance in further showing that the Joint Administrators fraudulently misrepresented the market value of Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company and its four subsidiaries, in the many different respects as enumerated therein;* and in addition to Mrs. O'Brien-Smith being entitled to receive the difference between what the Joint Administrators sold her interest for, and the market value of the interest. (R. II—1703a-1989a)

In the Second Amendment tendered *Mrs. Smith alleged that the Joint Administrators without disclosing to her, joined with the brothers of John A. O'Brien and transferred to a former partner thousands of dollars worth of stocks and bonds which were owned by, and in the name of Edward J. O'Brien & Company, in order to decrease Mrs. Smith's interest in the O'Brien Company, when the former partner had already been paid in full for her interest in 1928, before this transfer was made,* Mrs. Smith's Exhibits No. 61, 62, 63 and 64 (R. II—1722a-1724a; 1941a-1947a), which definitely avoid the District Court's ruling in his opinion of March 4, 1961, which was affirmed by the Court of Appeals.

Further, *Mrs. Smith set out in the Second Amendment a recapitulation of the additional values which the Joint Administrators owe her for her interest in Edward J. O'Brien & Company and its four subsidiaries,* both on the

basis of 21.25% and on the basis of 28.33%, (R. II—1716a-1719a) *which was not done in either her first Counterclaim filed, or her first Amended Counterclaim tendered.* (R. I—165a-330a)

When the *District Court* and the Court of Appeals allowed the Joint Administrators and their attorneys their fees they *disregarded the written agreement that the Louisville Trust Company had with John A. O'Brien before his death, dated July 7, 1933, to act as administrator for 1½% on the principal,* (Mrs. Smith's Exhibit No. 55, R. II—1927a-1928a) *and the letter from the Citizens Fidelity Bank & Trust Company agreeing to act as administrator for 1½% of the principal of the Estate (Mrs. Smith's Exhibit 56,* R. II—1929a-1930a); *also the affidavit of Ernest Kampfmueller in reference to administrators fees* of $14,000.00 *and attorneys fees for representing the Estate for final settlement for* $25,000.00, *and swore to the State Tax Commissioner and the Internal Revenue at Washington, D. C., that those fees would be for full settlement of the O'Brien Estate.* (See Mrs. Smith's Exhibits 57, 58, 59, 60, R. II—1931a-1940a) All of these exhibits were tendered with Mrs. Smith's Second Amended Answer and Second Amended Counterclaim, which definitely avoid the District Court's first ruling on March 4, 1961.

Under the doctrine of recoupment, Mrs. Smith is entitled to prove that the *Joint Administrators under the law are not entitled to any compensation or fees as Joint Administrators, for representing the Estate of John A. O'Brien;* and *further that their attorneys are not entitled to any fees for representing the Joint Administrators of the Estate of John A. O'Brien, in filing three settlement suits in the Estate of John A. O'Brien, and several appeals, four of which Mrs. O'Brien-Smith won by the opinions of the Court of Appeals of Kentucky, supra.*

Further, *the Joint Administrators are not entitled to any compensation or fees for filing an Appeal to the Jefferson Circuit Court from the "Rule Issued" against the Joint Administrators, by the Honorable Horace M. Barker, Judge of the Jefferson County Court on February 24, 1949,* to file a final settlement of the O'Brien Estate in the Jefferson County Court on June 5, 1949, when the Joint Administrators *were already thirteen years in default of their statutory duties under KRS 3858, which is now KRS 25.175.*

Neither the Joint Administrators nor their attorneys are entitled to any legal fees, or their expenses involved, in any of the law suits filed and prosecuted in the estate, unless prosecuted for the benefit of the estate. None of the suits were beneficial to the estate, and the estate therefore, should not bear the burden of this continued, unnecessary and expensive litigation. See *Beeler & Others, Heirs of Hill* v. *Hill's Executor and the other Heirs,* 35 Ky. 37 (1837).

11. The District Court And The Court Of Appeals Ruling, Decided An Important Question of Kentucky Law In Conflict With Applicable Kentucky Decisions In Overruling Defendant Mrs. O'Brien-Smith's Motion For An Order Requiring The Joint Administrators To Pay Into The District Court The Remaining Cash Assets Of $30,788.86 Held By Them And Belonging To The O'Brien Estate.

The Joint Administrators admit holding a balance of $30,788.86 in cash assets belonging to the O'Brien Estate (R. I—41a-45a). The District Court erred in denying Defendant's motion for an order that this money be paid into Court, and the Court of Appeals upheld his ruling. See grounds stated in Defendant's written Motion (R. I—117a-119a). The Joint Administrators contend they have finally settled the estate and were discharged on their bonds. *The facts are that this estate has not been settled and the ad-*

ministrators have not been discharged on their bonds. Opposing counsel argued that this money is a "credit", apparently inferring that as such it belongs to the Joint Administrators. (R. II—1361a.) In truth and in fact, and in every legal sense, these funds are assets of the O'Brien Estate, which have never been disbursed nor distributed. In their very complaint in this action, the Joint Administrators set up "Balance remaining in hands of administrators . . . $30,788.86 (R. I—41a), referring to this amount as the "balance of Mr. O'Brien's Estate which remains in said Joint Administrator's hands . . ." (R. I—45a). None of the acccuntings made to date, including the so-called "final settlement", constitute or can be construed under Kentucky law a final settlement of the O'Brien Estate. *So long as assets are retained in the Joint Administrators' hands, there is a continuing trust yet to be administered and finally settled. The Joint Administrators' Complaint in this suit is, in effect, nothing more than an action for the settlement of the O'Brien Estate; Stanberry's Adm'r. v. Robinson, etc.,* 16 KLR 309, 27 S.W. 973; *Com. v. Graves County,* 159 Ky. 455, 167 S.W. 411.

12. The District Court And The Court Of Appeals Upheld The Joint Administrators In Violating KRS 395.310 (Ky. Sts. 3859) In Failing To Require The Joint Administrators To Pay Interest Compounded At The Rate Of (6%) Six Per Cent Per Annum, On Cash Retained By Them Belonging To Mrs. Smith Since 1936.

The Joint Administrators owe $84,631.65 for interest on cash belonging to the O'Brien Estate and Mrs. Smith, held by them since February 11, 1936. *The payment of interest by administrators on surplus assets held in their hands two years after expiration of their qualification has been obligatory by statute in Kentucky since 1867, and is the law today, KRS 395.310 (Ky. Sts. 3859),* and *after the two years, pay-*

ment of interest is mandatory. The Joint Administrators paid no interest on the assets held, belonging to the Estate of John A. O'Brien, as enumerated in the First Amended Counterclaim (R. I—187a-221a; 223a-224a), *in the Second Amended Answer and Second Amended Counterclaim* (R. II —1745a). The monies of the O'Brien estate were commingled with the money of the banks of the Joint Administrators, on which interest is legally due and payable. See *Farmers Bank & Trust Co.* v. *Stanley*, 190 Ky. 762, 228 S.W. 691 (1921); *Steel's Adm'rs* v. *Lewis*, 32 KLR 439, 105 S.W. 1191; *Howe* v. *Winn*, 150 Ky. 667, 150 S.W. 842.

In June, 1946, the Joint Administrators admitted that they still had in their possession, Twenty Five Thousand ($25,000.00) Dollars in cash belonging to the Estate of John A. O'Brien, and Mrs. Smith, on which they have not to this day paid any interest thereon, to the O'Brien Estate or to Mrs. O'Brien-Smith.

In June 1946, the Joint Administrators were still holding and refusing to turn over to Mrs. O'Brien-Smith certain stocks owned by John A. O'Brien, at the time of his death which Mrs. Smith inherited, which had a market value of over Fifty Two Thousand Seven Hundred Twenty One Dollars and Five Cents ($52,721.05).

In order to get the above stocks, illegally withheld by the Joint Administrators for over twelve years and six months, Mrs. O'Brien-Smith was required to give to the Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, an additional Fifteen Thousand ($15,000.00) Dollars cash from her own funds for them to retain for lawyers and executors fees. No interest has been paid on this $40,000.00, and when the interest due is added to the $40,000.00, it makes a total of $124,631.95 cash remaining in the hands of the Joint Administrators belonging to Mrs. Smith on November 9, 1962, when the District Court

ruled and the Court of Appeals upheld his ruling, that the Joint Administrators may retain the cash belonging to Mrs. Smith. *To this day, the Joint Administrators are still holding that amount of cash and have not paid any interest thereon.* They claim that they have spent all of this amount except thirty thousand seven hundred eighty eight dollars and eighty six cents ($30,788.86), for expenses and briefs *in law suits against the Estate and Mrs. Smith, all of which were lost by the Joint Administrators and won by Mrs. Smith in the Court of Appeals of Kentucky by four printed decisions, supra.* By the District Court's Order and Summary Judgments of November 9, 1962, and the Court of Appeals Judgment of April 17, 1964, they approved the Joint Administrators refusal to pay interest without ruling thereon, and ruled that they may retain the remaining amount of cash in their hands of $30,788.76 as a credit against the $73,756.98 awarded to them plus 6% interest by the District Court, the Court of Appeals modified the ruling of the District Court only, as to interest on the Judgments should be from November 9, 1962, instead of from May 1, 1952, and in so doing admitted that the Judgments of May 1, 1952 of the County Court was not a bona fide Judgment.

13. **The District Court And The Court Of Appeals Upheld The Ruling, In Overruling The Motion Of Mrs. Smith, To Bar William Marshall Bullitt, And All Other Members Of The Law Firm Of Bullitt, Dawson & Tarrant From Representing The Louisville Trust Company And The Citizens Fidelity Bank & Trust Company, The Joint Administrators, Against Her In The Within Action, Because They Represented Mrs. Smith From January 1934 To February 12, 1936.**

The District Court and the Court of Appeals upheld his ruling in overruling Mrs. O'Brien-Smith's motion for an

order barring William Marshall Bullitt and all other members of the law firm of Bullitt, Dawson & Tarrant from representing the Plaintiffs Joint Administrators in this action against her. (R. I—108a-114a)

Following John A. O'Brien's death in 1934, Mrs. O'Brien-Smith engaged William Marshall Bullitt and his law firm (then Bruce & Bullitt, now Bullitt, Dawson & Tarrant) to represent her interest both in the final settlement of the O'Brien Estate, and in obtaining the proceeds of the insurance left her by her husband. Bullitt accepted this employment for himself and his firm to represent her. Thereafter, some two years later, on February 11, 1936, these lawyers were paid by the Joint Administrators, from cash in their possession belonging to Mrs. O'Brien-Smith, for legal services, the sum of twenty three thousand three hundred thirty three dollars and thirty three cents ($23,-333.33), although to that time no suits had been filed in the Estate, nor any pleadings or other papers of any kind prepared or signed by said attorneys on behalf of their client, Mrs. O'Brien-Smith. At the very outset, these lawyers (Bullitt and his firm) were already representing other persons and business concerns, whose interests directly conflicted with and whose causes directly opposed those of Mrs. O'Brien-Smith. (See Statement of Facts in this Petition. Yet there was no disclosure as required by the professional canon of ethics to his client Mrs. O'Brien-Smith, by Bullitt or any other member of his law firm, of the circumstances of his relations to these opposing parties, or of any interest in or connection with the subject matter such as would, without question, have influenced his client Mrs. O'Brien-Smith to choose other counsel. However, this clandestine violation of ethics, rendering nugatory at first blush the requirements and expectations of first duty, loyalty and strict allegiance to contend for his client,

Mrs. O'Brien-Smith, was not all. *After these lawyers were paid as above stated, they then refused to further represent Mrs. O'Brien-Smith, and thereafter and have since, openly and actively, represented the Plaintiffs-Joint Administrators herein on the opposing side and in direct conflict to the causes of Mrs. O'Brien-Smith. It is elementary to members of the legal profession that not only is it unprofessional to represent conflicting interests, but the obligation to represent a client with undivided fidelity forbids also the subsequent acceptance of employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.* (See Canon 6 of Professional Ethics—American Bar Association).

Because of the unfair advantage, the inequities and resulting detrimental effect upon the Defendant Mrs. O'Brien-Smith's cause in the within action, brought on by these attorneys' activities as related, the Motion for an Order barring their representation for and on behalf of the Plaintiffs Joint Administrators should have been sustained. (R. I—108a-114a).

14. The District Court Erred In Its Order And Summary Judgments In Allowing Interest On The Joint Administrators' Fees And Their Attorney's Fees On Their Alleged Over-Payments To Mrs. O'Brien-Smith, Filed And Entered On November 9, 1962.

In 1936 the Joint Administrators kept from the sale of Mrs. O'Brien-Smith's partnership interest $100,000.00 in cash to use for administering the O'Brien Estate. In addition, they held some $52,000.00 in personal stocks of John A. O'Brien, deceased. In 1946, ten years later, some $75,-

000.00 had been expended by the Joint Administrators, leaving a cash balance of $25,000.00. Mrs. O'Brien-Smith brought an action in Circuit Court at Louisville, Kentucky for delivery of the personal stocks, valued at $52,000.00, and the cash balance, plus interest on the same. The Joint Administrators resisted this demand and asked for an additional $15,000.00 to add to the $25,000.00 cash in hand, making a total of $40,000.00 the Joint Administrators asserted they needed for winding up the estate and paying all the remaining expenses to be incurred in the estate, including their own and their attorneys fees. The Circuit Court awarded Mrs. O'Brien-Smith the personal stocks, and directed her to pay to the Administrators the additional $15,000.00. Mrs. Smith denied any of the $40,000.00 was due or needed to settle the estate and demanded interest on all the monies held by the Administrators.

The Joint Administrators owe the O'Brien Estate interest under provisions of KRS 395.310, in the amount of $84,631.65. Had the $40,000.00 cash held in their hands, and which they said was sufficient in 1946, been invested as required by law, there would, by this date, be more assets on hand than the amount they now claim and certainly no deficit as they now allege.

The statute relating to overpayment cited in the Complaint (KRS 396.140) does not apply in the within case. See the case of *Beeler &c.* v. *Hill's Ex'r., &c.,* 35 Ky. 37, (Vol. V Dana 37) is controlling.

15. The District Court Erred in His Ruling That The Issues Presented By Mrs. Smith's Original Counterclaim Are Barred By The Statute Of Limitations, And The Court Of Appeals Did Not Rule On This Issue.

The District Court erred in ruling that the issues presented by Mrs. Smith's Original Counterclaim are barred by the Statute of Limitations.

The Court of Appeals opinion did not rule on the issue of the Statute of Limitations and on this issue they stated as follows:

> "As an additional basis for dismissing the counterclaim, the District Court held that the right of action asserted therein was barred by limitations. In view of our holding on the question of res judicata, we do not find it necessary to discuss in this opinion the question of the statute of limitations."

The District Court erred in holding that Mrs. Smith cannot sue the Joint Administrators as principals or as sureties on their bonds, on page six (6) and seven (7) of its opinion, and on page four (4) and five (5) of the said opinion sets out the Statute of Limitations of Kentucky. (R. II—1607a-1629a.)

The Statute of Limitations of Kentucky upholds Mrs. Smith's contentions that she can sue the Joint Administrators for fraud on their bonds, as she alleged in her original counterclaim filed with her original answer in the within action on November 12, 1956. (R. I—134a-139a.)

The District Court sets up the Statute of Limitations of Kentucky which distinguish between different types of actions, and he admits that under section 413.090 Kentucky Revised Statutes (Carroll's Ky. Stats. Section 2514) that Mrs. Smith had fifteen (15) years after the cause of action first accrued in which to file suit against the Joint Administrators on their bond.

The District Court further sets up fourteen (14) other sections of the Kentucky Revised Statutes which have no application to the issue in the within action and states that it is necessary for the Court to determine when the de-

fendant's cause of action for the alleged fraud arose and the nature of the cause of action which she asserts.

The District Court erred in holding that Mrs. Smith pursued her claim of fraud against the Joint Administrators in the Rescission Suit which was against the O'Brien brothers only in the case of O'Brien v. O'Brien, 294 Ky. 793, 172 S.W. 2d 595 (1943); and he cites an excerpt from the Rescission Suit, which in no way supports his ruling that Mrs. Smith knew that the Joint Administrators were guilty of fraud in 1937, and in no way does it prove that she claimed fraud against the Joint Administrators in the Rescission Suit.

The District Court erred in holding in his opinion that there had been a number of lawsuits all pointed toward the determination of the issue of fraud in the settlement between the defendant and the other interested relatives and the Administrators, because none of the lawsuits which have been prosecuted in the Estate of John A. O'Brien ever raised the issue of fraud against the Joint Administrators of the O'Brien estate.

The District Court further held that twenty (20) years had passed from the time of Mrs. Smith's discovery of the alleged fraud to the time of the commencement of the within action and that she cannot sue the Joint Administrators as principals or as sureties, and that she was barred my the Statute previously cited which allowed her only five (5) years after the cause of action accrued, and that Mrs. Smith is barred by the Statute of Limitations for the reasons set forth in his opinion, (R. II—1608a-1614a).

Mrs. Smith did not discover that the Joint Administrators were the ones who were guilty of fraud, misrepresentation, negligence, mismanagement and failure to disclose to her the market value of her interest in the Edward J.

O'Brien Tobacco Company, and its four subsidiaries, and the O'Brien brothers were not alone guilty of fraud until after the final decision in the case of O'Brien v. O'Brien in May, 1944, supra, and until after the so-called final settlement filed by the Joint Administrators in 1950 in the Jefferson County Court, and approved by the Judgment of the Jefferson County Court on March 5, 1952 and the Amended Judgment on May 1, 1952, and she filed her original counterclaim herein on November 12, 1956. In the Rescission Suit, the Court of Appeals of Kentucky held in effect that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the book value or the market value of her partnership interest because she had "competent and trustworthy counselors", holding in effect that the Joint Administrators should have ascertained the market value of her partnership interest in Edward J. O'Brien Tobacco Company, and its four subsidiaries, and both of the vice-presidents of the two trust companies, the Joint Administrators herein under oath, stated that they made no investigations whatsoever and took the word of Edwin J. O'Brien, Jr., as to what Mrs. Smith's partnership interest was worth.

Further, Mrs. Smith did not know that the Joint Administrators had converted her funds which was in their possession to their own use, and that they had transferred several hundreds of thousands of dollars worth of stocks from the O'Brien Company to one of the former partners, until after they filed their first partial settlement of the O'Brien Estate in the Jefferson County Court on June 21, 1950. Mrs. Smith's original counterclaim was filed in the within action on November 12, 1956, just six years five months and twenty one days after the Joint Administrators purported final settlement of the O'Brien estate was filed in the Jefferson County Court, on June 21, 1950, and within five years from the date the Judgment was filed on March

5, 1952, and the Amended Judgment was filed on May 1, 1952, in the Jefferson County Court.

The District Court erred in its ruling that the defendant Mrs. Smith's original counterclaim relating to the sale of the decedent's partnership interest is barred by the Statute of Limitations. The District Court asserted that if Mrs. Smith had any cause of action upon her counterclaim it must be based upon the Joint Administrators' bonds. The District Court stated in his opinion that an action upon an administrators' bond is governed by KRS 413.090, and that the counterclaim of Mrs. Smith is barred by that statute, because Mrs. Smith did not commence an action thereon within 15 years after her cause of action "accrued". The cause of action could not nor can it accrue until the final settlement of the accounts of an estate are filed by the Joint Administrators, in the County Court.

To properly understand the legal effect of an administrator's bond, it is necessary to examine the statutory provisions pertaining not only to the bonds, but to the duties of the administrator for the performance of which the bond is required. The requirements of a fiduciary bond, in Kentucky, are fixed by the Kentucky Revised Statutes and under KRS 62.060, it provides that the bond of a fiduciary shall be a covenant from the principal and surety "that the principal will faithfully discharge his duties". Among the "duties" specified by statute to be performed by the personal representative or an administrator are these "musts".

KRS 25.175 provides:

> (1) He "must" one year after his appointment, and annually thereafter until otherwise provided by law "Render An Accounting Of The Execution Of His Trust To The Court By Which He Was Appointed."

1. The Joint Administrators of the O'Brien estate did not comply with the provisions of this Statute, they did not file

even a partial settlement of the said estate until on June 21, 1950.

(2) He "must" render an accounting at any other time upon the order of the court.

2. The Joint Administrators refused to comply with the order of Judge Mark Beauchamp of the Jefferson County Court, to file a final settlement of the O'Brien Estate on March 1, 1936.

3. The Joint Administrators refused to comply with the four opinions and mandates of the Court of Appeals of Kentucky, to file a final settlement of the O'Brien Estate in the Jefferson County Court.

4. The Joint Administrators refused to comply with the "Rule Issued", against them, to file a final settlement of the O'Brien Estate, by Judge Horace M. Barker on June 5, 1949, and filed an appeal therefrom to the Jefferson Circuit Court on May 26, 1949, which was not finally determined until October 1954.

(3) "AT THE EXPIRATION OF HIS TRUST SUCH FIDUCIARY MUST FULLY ACCOUNT FOR AND PAY OVER THE TRUST ESTATE TO THE PERSON OR PERSONS ENITLED THERETO," and

5. The Joint Administrators did not comply with this Statute in that they did not pay into Court or to Mrs. Smith the sole beneficiary of the O'Brien estate, the cash held by the Joint Administrators in excess of One Hundred Twenty Four Thousand Six Hundred Thirty One Dollars and Ninety Five Cents ($124,631.95), when they filed the purported final settlement of the O'Brien estate, and they have not yet paid her this amount or accounted for same in any Court.

KRS 62.070 further provides:

"Recovery on the bonds shall not be restricted to the duties or responsibilities belonging to the office, trust

> or employment at the date the bond is executed, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed."

The bond of the plaintiffs Joint Administrators covenanted that they would faithfully discharge all the above duties. It is of no consequence that the Joint Administrators are corporate fiduciaries, because a corporate fiduciary is expressly made subject to all the duties and responsibilities as individual fiduciaries except, upon the bond of a corporate fiduciary, the only security, unless otherwise required, shall be "the capital stock," KRS 287.220. In the instant case the bond of the plaintiffs Joint Administrators contains no surety other than "the capital stock" of the two trust companies. No "capital stock" was deposited as security, when the Joint Administrators in the instant case executed their bonds and no necessity arises for construing the meaning or effect of the statute providing that upon the bond of a corporate fiduciary the only surety required is the capital stock. It is sufficient here to consider that the bonds are executed by plaintiff trust companies as principals, and they are proceeded against here as principals. No complications or sureties are involved, and the liability asserted against the plaintiffs Joint Administrators on Mrs. Smith's original counterclaim is their liability on the bond as principals. Under KRS 62.070 recovery against the surety is limited to the penalty fixed in the bond, "but recovery against the principal shall not be limited by the penalty fixed in the bond."

The statute therefore places upon the personal representative the duty to make annual court settlements of his accounts, and to pay over the trust estate to the persons entitled thereto "at the expiration of his trust", and the official bond of the personal representative covenants that he will faithfully do so. Manifestly, if the personal repre-

sentative fails to account for and turn over the property to the persons entitled thereto "at the expiration of his trust" he commits a breach of his bond. Since he engages by his bond to turn over the estate "at the expiration of his trust" the cause of action on his bonds accrues "at the expiration of his trust." The question immediately posed is, "has there been an expiration of plaintiffs' Joint Administrators' trust in the instant case?" If so, when did their duties as personal representative cease and determine? The answers to the questions are found in an exhaustive annotation in 44 ALR (2d) p. 808, wherein it is stated that, by the weight of authority, **the statute of limitations begins to run against the action on a bond of a personal representative from the date on which occurs a final judicial ascertainment of the liability of the personal representative. In 44 ALR (2d) pp. 808, 809, it is stated:**

> "By the weight of authority the statute of limitations ordinarily begin to run against an action on the bond of a personal representative from the date on which occurs a final judicial ascertainment of the liability of the representative." . . .
>
> "Probate practice varies widely, of course, from jursidiction to jurisdiction. Usually the administration of a decedent's estate involves orders settling the intermediate or final accounts of the personal representative, orders directing the manner of distribution of the assets of the estate, and, at least sometimes, orders for the formal closing of the estate. Exhibiting a wide range of variations as to details, a number of cases support the proposition that limitations against an action on the bond of an executor or administrator —at least in the absence of specific circumstances requiring a different conclusion—commence to run at the time of the final judicial ascertainment of the liability of the personal representative to heirs, distributees, or creditors. This may mean the date of the only decree of distribution entered in the particular

estate; it may mean the date of the last of a series of decrees or orders for distribution; it may mean the date of the order approving the final account of the representative; it may mean the date of a decree surcharging the representative and then settling his accounts as corrected.

"As noted before, variation as to details is great. But the following cases may be cited as supporting the broad conclusion that what is to be properly regarded as the final judicial ascertainment of the principal's liability marks the time limitations commence to run against an action on the official bond."

In *Hargis* v. *Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, 9 Ky. Law Rep. 920, the court made the observation that the administrator's duties were not terminated until final settlement of his accounts, saying:

"It seems to us therefore—First that the disposition of the estate in pursuance of the settlement made in 1867, of which the apportionment of the land is to be regarded as a part, Was An End Of The Executorial Duties Of The Sons" . . .

"Applying this principle here, we see no reason why the lapse of time does not bar the appellants cause of action. It Arose When The Settlement And The Division Under It Were Made, And From That Time The Statute Began To Run—The limitation of 15 years applying to the principal obligors, and 5 years to the sureties."

Likewise in *Hargis* v. *Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, the court made the observation that the administrator's duties were not terminated until final setlement of his accounts saying:

"This rule could not have been applied to an administrator regardless of the present statute as he was never considered as such a trustee, After The Settlement Of His Account And The Distributable Share Of The Heir Ascertained."

Also see the cases of *Kitchen's Ex'rs.* v. *King,* 255 Ky. 235, 73 S.W. 2d 45; *Anspacher* v. *Utterback's Adm'r,* 252 Ky. 666, 68 S.W. 2d 15; *Blackwell et al* v. *Fidelity and Deposit Co.,* 163 Ky. 76, 173 S.W. 321; *Blake* v. *Wolfe,* 105 Ky. 380, 49 S.W. 19, 20 Ky. Law Rep. 1212; *Wren's Exr* v. *Wren's Ex'r,* 126 Ky. 704, 104 S.W. 737, 31 Ky. Law Rep. 1096, and *Rison et al* v. *Shepherd et al.,* (1945) 299 Ky. 693, 186 S.W. (2d) 648.

The statute here involved, KRS 413.090(3), applies to actions upon the bonds of receivers, as well as personal representatives. In the case of *U.S. Fidelity & Guaranty Co.* v. *Shields,* 157 Ky. 371, 163 S.W. 203, the court held that the statute of limitations against an action upon the bond of a receiver did not commence to run until the receiver had made a settlement of his account, or had made a report to the court. The court there said:

> "The plea of the statute of limitations is unavailing. The plaintiff had no cause of action against the receiver, while he held the fund subject to the order of the court. He had never settled his accounts or made a report to the court, and until the court determined to whom the money was to be paid, no action could be brought. The seven year statute bars an action against the surety after seven years from the time the cause of action accrued. But the statute does not begin to run until the cause of action accrues. Here the cause of action did not accrue until shortly before this action was brought. The cause of action against the surety accrues at the same time as it does against the principal."

Likewise in the case of *Tucker* v. *Aetna Casualty & Surety Co.,* 270 Ky. 723, 110 S.W. (2d) 649, the court held that the right of an heir to sue for his distributable share of the estate of a decedent accrues upon the settlement of the estate. Referring to the case of *Hargis* v. *Sewell's Admr., supra,* the court said:

> ". . . It also was held that when the distributable portion of the estate had been ascertained by the settlement, any heir had the right to sue for his distributable share, and the statute of limitations would run from the accrual of the cause of action to the same effect. See *Schwerman* v. *Commonwealth*, 99 Ky. 296, 38 S.W. 146, 18 Ky. Law Rep. 585; *Grant County Building & Loan & Savings Association* v. *Lemmon*, 78 S.W. 874, 25 Ky. Law Rep. 1725; *Commonwealth* v. *Sammons*, 180 Ky. 403, 202 S.W. 885; *United States Fidelity & Guaranty Company* v. *Shields*, 157 Ky. 371, 163 S.W. 203."

The reasons for adopting the date of accounting and settlement for the commencement of the statute of limitations are obvious, and sound. No one can know the amount of his or her distributable share in decedent's estate until the personal representative has made an accounting and a final settlement of an estate. *And the finality of such accounting and final settlement, may have to await the final judgment of the court in the suit to surcharge the settlement for negligence or mismanagement.* The Joint Administrators do not claim, and cannot claim that they made any final court settlement of their accounts in the estate of John A. O'Brien, deceased, until March 5, 1952, and May 1, 1952. And, although their partial settlement is in the amended answer and amended counterclaim tendered hereby by Mrs. Smith, on the grounds of misrepresentations, negligence, threats, coercion, undue influence and mismanagement in the handling of the estate and a breach of trust, the 15 year period from the date of the final settlement will not expire until 1967, and is not barred. The sale of decedent's partnership interest by the Joint Administrators comprises an item that must be taken into consideration on a final settlement and accounting of the plaintiffs' Joint Administrators. As long as the Joint Administrators assume and continue to act as such administrators, and have cash in

their hands belonging to the estate, so long the counterclaim may be asserted, and it is not barred.

The so-called Judgment of March 5, 1952 under paragraph eight stated, "The Administrators be, and hereby they are, discharged and released from any, and all, further liability under their bonds as such," but when the Judgment was amended on May 1, 1952, the Joint Administrators were not discharged and released from any, and all, further liability under their bonds as such and paragraph eight was amended to read:

> "EIGHTH: The accounts of the Joint Administrators be, and hereby they are, approved and confirmed, in all respects.
>
> The Estate of John A. O'Brien, deceased, be, and the same hereby is, finally settled.
>
> The Joint Administrators be, and hereby they are, authorized and empowered to sue, and to take any and all steps necessary or proper to recover from Patricia O'Brien Smith (1) All the amounts adjudged against her in Paragraph SEVENTH of this Judgment; and (2) Any and all additional amounts constituting any over-payment by the Joint Administrators to the said Patricia O'Brien Smith, which aggregate amounts so recovered shall be sufficient for the Joint Administrators to pay in full all obligations of the Joint Administrators and of the Estate, as authorized in Paragraphs FIFTH and SEVENTH of this Judgment.'
> May 1, 1952
>
> Boman L. Shamburger,
> Judge."

(R. I—33a-35a.) Therefore the Joint Administrators are not discharged or released from their bonds and are still the Joint Administrators of the Estate of John A. O'Brien, and they still under Kentucky Law must file a final settlement of the estate of John A. O'Brien in the Jefferson County Court.

16. The District Court Granted The Joint Administrators' Motion For Summary Judgments By Its Order And The Summary Judgments Filed And Entered On November 9, 1962, Allowing Them The Amount of $218,472.80. The Court of Appeals Judgment Modified This Amount to $190,-933.40.

The District Court granted the Joint Administrators' Motion for Summary Judgments by his order, and allowed them two hundred eighteen thousand four hundred seventy-two dollars and eighty cents ($218,472.80) in the Summary Judgments filed and entered in the within action on November 9, 1962, and the Court of Appeals upheld his ruling except, that the six (6%) per cent interest on the joint administrators' purported Judgment should be from November 9, 1962, instead of from May 1, 1952.

It appears from the Summary Judgments of the District Court and the Court of Appeals that the Joint Administrators were only awarded $73,756.98 and states that it is subject to a credit thereon of $30,788.86 or the net sum of $42,968.12, with interest thereon at the rate of 6% per annum from March 5, 1952, and modified by the Court of Appeals that interest shall be from November 9, 1962 until paid, and their costs herein expended, but when an analysis of the Judgments is made, it shows that the District Court awarded to the Joint Administrators and their attorneys over $218,472.80, and the Court of Appeals modified the ruling and the total amount now awarded is $190,-933.40.

The Joint Administrators held cash in their possession belonging to Mrs. Smith, in the amount of $25,000.00 from February 11, 1936 to June 28, 1946. The compounded interest at the rate of 6% per annum to which Mrs. Smith is legally entitled on this amount is $20,779.38.

The Joint Administrators held cash in their possession belonging to Mrs. Smith in the amount of $40,000.00 from June 28, 1946, to November 9, 1962. The compounded interest thereon at the rate of 6% per annum which Mrs. Smith is legally entitled amounts to $63,852.57.

The Joint Administrators are still holding in their possession the forty thousand ($40,000.00) dollars cash belonging to Mrs. Smith which when added to the compounded interest makes a total of one hundred twenty four thousand six hundred thirty one dollars and ninety five cents ($124,631.95).

The District Court by his Summary Judgments awarded to the Joint Administrators all of the $40,000.00 cash held by them belonging to Mrs. Smith of which they contend that they now have only $30,788.86 remaining.

The District Court further awarded by his decree, the net sum of $42,968.12 with interest thereon at the rate of 6% per annum from March 5, 1952 until paid, and their costs therein expended.

The interest at the rate of 6% per anuum on $42,968.12 from March 5, 1952, to November 9, 1962, amounts to $27,-539.40, this amount is to be deducted from the above total amount, as modified by the Court of Appeals judgment. The District Court by his Judgments approved the $23,-333.33, *the amount of attorneys fees paid to the law firm of Bruce & Bullitt, which is now the law firm of Bullitt, Dawson & Tarrant, by the Joint Administrators from the cash belonging to Mrs. Smith* on February 11, 1936, for the final settlement of the estate of John A. O'Brien making a total net sum of $218,472.80 awarded to the Joint Administrators on November 9, 1962, the Court of Appeals modified the District Court's ruling only that the joint administrators were not entitled to interest on their alleged over-

payments except from November 9, 1962, until paid deducting this interest of $27,539.40 leaves a balance of $190,933.40 awarded to the joint administrators and their attorneys.

The Judgment of the United States Court of Appeals for the Sixth Circuit and the opinion thereon, filed and entered on April 17, 1964, modified the Judgment of the District Court, only as to interest on $42,968.12, at the rate of six per cent (6%) per annum from March 5, 1952, to November 9, 1962, and ruled that the joint administrators and their attorneys should receive the interest thereon only from November 9, 1962 until paid, and stated in Opinion page 9, Appendix D hereto, R. Vol. III, page 2368a and page 2381a as follows:

> "The judgment therefore will be modified to the extent that it awards interest from March 5, 1952, and so as to provide that the plaintiffs have and recover from defendant, Patricia R. Smith, the sum of $42,968.12, with interest thereon at the rate of six per cent per annum from November 9, 1962, which was the date of the entry of the judgment in this case. In all other respects the judgment of the District Court is affirmed and the case is remanded to the District Court for any further necessary action not inconsistent with this opinion."

We again repeat that this is a case to be decided upon facts, and the statutes and law of Kentucky applicable to the facts of this case which are settled and well established.

Upon an examination of the facts it becomes clear that Mrs. O'Brien-Smith was the sole beneficiary of the last will, and of the Estate of her late husband, John A. O'Brien, as it was held by the Court of Appeals of Kentucky.

At the death of John A. O'Brien, Mrs. O'Brien-Smith inherited through his estate, 23.77% of the entire Edward

J. O'Brien & Company and its four subsidiaries. Further, at the death of John A. O'Brien, the Estate automatically became a partner in the O'Brien partnership. The Joint Administrators did not reveal the true facts to Mrs. O'Brien-Smith, the sole beneficiary, and they misrepresented the law to her upon her legal rights. The partnership agreement between the partners provided that the estate or its representative should remain a partner for five years after the death of one of the partners.

The Joint Administrators, the Plaintiffs herein, have acted in bad faith. Equity requires therefore that they must account to the Estate and Mrs. O'Brien-Smith, the sole beneficiary of the estate, for the full market value of the estate and her 23.77% interest in the partnership of Edward J. O'Brien & Company and its four subsidiaries on November 5-15, 1935, and its 23.77% of the net profits of the O'Brien Company and its four subsidiaries for the years of 1935, 1936, 1937 and to December 31, 1938, without any allowance for Joint Administrators fees, or their attorneys fees. Since not one cent of the fees allowed to them by the District Court and the Court of Appeals was for the benefit of the O'Brien Estate or Mrs. O'Brien-Smith, *if any legitimate claims ever existed for the Joint Administrators, it has been forfeited by wilful waste, mismanagement, and three trumped-up settlement suits* and *numerous appeals prosecuted by the Joint Administrators and their attorneys for twenty-nine (29) years, to keep from signing and filing the receipts and disbursements and a final settlement of the O'Brien Estate in the Jefferson County Court, and to this day it has not been filed.*

The Joint Administrators have violated their statutory duties imposed upon them by the statutes and law of Kentucky in every respect, as fully set out in Mrs. O'Brien-Smith's original answer and counterclaim; (R. I—121a-

139a) her first amended answer and her first amended counterclaim; (R. I—164a-330a), and in her second amended answer and second amended counterclaim. (R. II—1703a-1989a), further, no consideration was given to recoupment by the District Court, or the Court of Appeals.

The proceedings to settle estates in Kentucky was so old that it was new to an out of State District Judge who never did understand probate procedure in Kentucky, thus, causing him to make a grievous error in his ruling concerning the Surcharging of a Settlement of an estate, which had been filed in a County Court, and the many other errors as pointed out and the Court of Appeals upheld his ruling.

The denial by the District Court for leave to amend is contrary both to the letter and spirit of Rule 15, resulting in error highly prejudicial to the cause of Mrs. O'Brien-Smith, by reason of which denial, the judgment should have been reversed.

The record in this case demonstrates the most flagrant violations by the Plaintiffs-Joint Administrators of their duties imposed by the statutory and general laws of the State of Kentucky for governing the administration of the estate entrusted to their care. As a result, Mrs. O'Brien-Smith was defrauded out of a substantial part of the value of her deceased husbands interest in Edward J. O'Brien & Company and its four subsidiaries for which the Joint Administrators under all the rules of law and statutes of Kentucky and the cases heretofore cited, are bound to account. Not only did they defy the mandates of the law and specific rulings directing them to file a final settlement of the O'Brien Estate in the County Court by the Court of Appeals of Kentucky for 14 years, but they breached the duty imposed upon fiduciaries to deal in utmost good faith for the benefit of the trust undertaken by them.

The Louisville Trust Company and Citizens Fidelity Bank & Trust Co., the Joint Administrators, had George Caldwell, a lawyer and Vice-President of the Louisville Trust Co., and James G. McPherson, Vice-President of the Fidelity & Columbia Trust Co., which is now Citizens Fidelity Bank & Trust Co., who was connected with that company for nearly forty years, to write up the offer and contract for the sale of the interest owned by the estate of John A. O'Brien which Mrs. O'Brien-Smith inherited, and for which they sold for less than one-third of its market value, and only accounted to the estate and Mrs. Smith for one year's profits. When in reality the estate and Mrs. Smith's interest had a market value of $1,216,-536.51 and the estate was entitled to remain in the Company for five years and receive the net profits for five years, from and after the death of John A. O'Brien until December 31, 1938, which amounted to $149,480.51. At that date, the deceased partner's estate would be clearly entitled to an accounting of its 23.77% of all assets, under definite instruction from this Court as to procedure. From such market value found to belong to the estate and Mrs. O'Brien-Smith, upon such accounting, must be subtracted the amount already paid to her by the Joint Administrators, viz, two hundred eighty thousand ($280,000.00) dollars. The Estate of John A. O'Brien and Mrs. O'Brien-Smith should then have a decree for the balance due upon such accounting, plus all the amounts due her upon such accounting, and plus all the amounts due her as set out in her First Amended Answer and First Amended Counterclaim, and in her Second Amended Answer and her Second Amended Counterclaim.

This case, like all other equity cases, is governed by the broad maxim that a Court of equity which has obtained

jurisdiction of a controversy will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter. Manifestly, the circumstances are such that this Court cannot easily restore Mrs. O'Brien-Smith to her position in the partnership as it was prior to November 5-15, 1935, when the contract of sale was made, or February 11, 1936, when the bill of sale was signed. Therefore, this Court has power to permit the sale of the partnership interest of John A. O'Brien to stand, but to grant relief based upon the fraud as of that date. In other words, this Court has power to decree an accounting by the Joint Administrators for the market value of such partnership interest as of such date which they fraudulently sold the John A. O'Brien estate's interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries.

This would be a comparatively simple matter, because the record in this case provides the basis for such values as of November, 1935. But this record does not contain such basis of values for December 31, 1938, the end of the five-year period when John A. O'Brien's partnership interest automatically terminated, because *the Court prohibited Mrs. Smith from showing such values as of that date by his refusal to grant her a trial of the issues by a jury in this action.*

An accounting would likewise be a comparatively simple matter. It would cover the items of additional value over and above the figure $425,649.45 which was represented by the Joint Administrators as the market value of John A. O'Brien's interest in the partnership, as fully set out in this Petition on pages 56-57 and 69-70.

There can be no question that under Kentucky law that the formal entry of an order of confirmation of the settlement of an estate, no exceptions having been filed thereto, thus no judicial contest, litigation, or decision on the exceptions, was not a *final judgment* conclusive of the rights of the parties from which appeal could be taken, and which precludes the aggrieved party from bringing her suit to surcharge and correct the alleged errors in the settlement. Under the Kentucky law this can be done within five years.

The Federal District Court and the Court of Appeals decided on an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

The ruling in this case by the District Court and the Court of Appeals is based on a false premise,

> That a final Order and Judgment had been rendered in the County (Probate) Court of Jefferson County, Kentucky, when in truth and fact a County (Probate) Court in Kentucky has no such power, so the Judgments of the District Court, and the Court of Appeals, are based on a nullity as far as a final judgment is concerned in a Kentucky County (Probate) Court. *This so-called final Judgment is only a document to preserve prima facie evidence between the parties concerned.*

Unfortunately for the Petitioner, the Judge in the District Court before whom this case was heard grew up, and became a prosecuting attorney, in a jurisdiction where the Probate Court is among the strongest in the nation. The Probate Courts in Michigan, have final and complete jurisdiction of the res, and complete and final administration of an estate.

In Kentucky there are no Probate Courts. The settlement of estates in Kentucky are controlled by the statutes, and Kentucky law.

None of the members of the Court of Appeals (before whom this case was heard on oral argument) are from the State of Kentucky. One of the Judges is from Tennessee and two are from the State of Michigan, which have probate Courts of final jurisdiction. So, the Court of Appeals was misled by the District Judge, and they do not have any particular knowledge of the so-called probate law of Kentucky.

There are many phases to this case, the line of least resistance was to follow a long opinion of the lower (District) Court. The decision of the District Court was based on a false premise and the lower Court admits in effect that he might have flipped a coin and wrote his opinion accordingly.

We call to this Honorable Court's attention a statement made by the District Court (Judge Kent), on November 9, 1962, in Appendix C hereto, R. Vol. II, p. 2171a, the Court said in speaking of the Judgment of the County Court of March 5, 1952, "If we were right before (meaning in his opinion of March 4, 1961), we are right now. If we were wrong before, we are wrong now."

"In other words, either it is, or it is not a final order (judgment)." This was said by the District Court on November 9, 1962, at his second and last hearing in this action at Louisville, Kentucky. None of the three Federal Judges in the United States Court of Appeals or in the District Court, had an opportunity to become familiar with the substantive law applicable. So, the Court of Appeals and the District Court do not have any particular or special knowledge with the so-called probate law of Kentucky.

R. Lee Blackwell, an attorney for the Trust Companies said on November 9, 1962, at the hearing before the District Court, that "We bottom our motion (in respect to the Trust Companies' Motion For Summary Judgments and

to deny Mrs. Smith the right to file a second amended counterclaim which was tendered for filing on May 15, 1961, by Mrs. Smith) solely upon the proposition that the *county court judgment* and amended judgment *did finally settle* the estate * * *."

Then on October 31, 1963, eleven (11) months and twenty-one (21) days later, the same attorney filed a brief in the Court of Appeals stating that *"the County Court (in Kentucky) cannot enter an in personam judgment upon which an execution may issue for its enforcement."*

Even though the counsel for the two Trust Companies admitted in their brief (filed in this action in the Court of Appeals) that the Jefferson County Court *could not enter an in personam judgment, and he admitted at the oral argument before three of the judges of the Court of Appeals, that the County Court of Kentucky could not enter an in personam judgment, upon which an execution may issue for its enforcement*, yet the Court of Appeals with these two admissions from the Trust Companies' counsel, have ruled that the Judgment of the County Court of March 5, 1952, and amended on May 1, 1952, is a final judgment and that Mrs. Smith's remedy was by appeal to the circuit court.

The Court of Appeals admits that there are two ways under Kentucky law to challenge the final settlement of accounts of an executor or administrator: (1) The party feeling aggrieved by the settlement may file exceptions thereto, and appeal to the State Circuit Court from the action of the County Court; or (2) the aggrieved party may let the settlement be confirmed and approved by the County Court, without written exceptions, and file an action within five years to surcharge and falsify the settlement on ground of error, mistake or fraud, and the Court

of Appeals correctly states the Petitioner's contentions under the cases cited.

The analysis of the Court completely misses the point, because Mrs. Smith was never before the County Court contesting the right of the fiduciary to credits.

In the proceedings in the County Court wherein the joint administrators' fees and their fees for their attorneys were allowed, neither Mrs. Smith or any attorney for her appeared, and Mrs. Smith did not file any pleading or exceptions contesting those fees. In the proceedings which resulted directly in the allowance of those fees, Mrs. Smith did not appear, and she did not file any exceptions at all, and under the Kentucky law and Statutes she had the right to contest those fees and all other invalid items within five years from the date the Judgment and Order was filed in the Jefferson County Court, on March 5, 1952, and amended on May 1, 1952, to wit, by Kentucky law, she had until May 1, 1957, to file a suit to surcharge and falsify the joint administrators' purported final settlement of their accounts of the Estate of John A. O'Brien under the Kentucky law.

The Court of Appeals erroneously construed the Kentucky rule of law, and further upheld the District Court that the petitioner took part in and participated in the settlement of the final account within the meaning of Kentucky law. Mrs. Smith did not participate in the actual settlement proceedings, she did not file any written exceptions to the purported final settlement of accounts of the joint administrators in County Court, so no contest, litigation, or decision was ever had to test the validity of any claim in the settlement from which an appeal could be taken.

We are fully supported in Mrs. Smith's contentions by the following cases:

Scott's Heirs v. Kennedy's Ex'r., etc., 12 B.M. 510-515, 51 Ky. 510-517, 4 KLR 712 (1849);

Stanberry's Adm'r. v. Robinson, etc., 16 KLR 309, 27 S.W. 973;

Bell v. Henshaw, 91 Ky. 430, 15 S.W. 3, 12 Ky. Law Rep. 674;

Dees' Adm'r. v. Dees' Ex'r et al., 249 Ky. 650, 61 S.W. (2d) 301-302 (Court of Appeals of Ky. June 6, 1933);

Turley's Adm'r. v. Barnes, etc., 103 Ky. 127, 44 S.W. 446, 19 Ky. Law Rep. 1808;

Wheedon's Adm'r. v. Barrett's Guardian et al., 253 Ky., pages 737-743;

Brady v. Brannon, 134 Ky. 769, 121 S.W. 679, 680;

Central Trust Co., etc. v. Bennett, 208 Ky. 281, 270 S.W. 821.

There can be no question that under Kentucky law the Petitioner's Motion for leave to file an Amended Answer and an Amended Counterclaim to surcharge and falsify the Joint Administrator's purported final settlement of the accounts of the estate of John A. O'Brien should have been sustained. In holding otherwise, the Court of Appeals decided an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

For the convenience of this Court, some of the Kentucky Statutes, some of the Kentucky law citations, and some of the other citations cited herein, which sustain the Petitioner's contentions, are printed in Appendix A hereto, under a separate cover.

The Court of Appeals erroneously construed the statutes and the provisional law of Kentucky, as cited in its opinion, on final judgments and settlements of estates in Kentucky, and the duties and responsibilities imposed upon administrators by the Statutes and laws of Kentucky.

1. One of the main issues raised and set out in the Plaintiffs Trust Companies' Complaint, (which consisted of 82 printed pages) is the sale made by the Plaintiffs Trust Companies of the twenty eight and thirty three one hundreths (28.33%) per cent partnership interest in the Edward J. O'Brien & Company, (one of the largest independent tobacco brokers in the world), owned by the Defendant Patricia R. Smith, which the Trust Companies sold for less than one third of its market value. The said issue was fully answered and controverted by the Defendant Patricia R. Smith, in her answer and counterclaim filed in the within case on November 12, 1956. On this issue the District Court refused to have a trial, or permit any testimony to be introduced, and the Court of Appeals, upheld the District Court in this ruling.

The decision of the Court of Appeals for the Sixth Circuit in upholding the District Court in taking jurisdiction of a probate matter, which is an action filed by the Joint Administrators of the Estate of John A. O'Brien, the Plaintiffs-Respondents, for the final settlement of their accounts of the Estate of John A. O'Brien, wherein the District Court awarded to the Joint Administrators and their attorneys an additional Seventy Three Thousand Seven Hundred Fifty Six Dollars and Ninety Eight Cents ($73,-756.98) for fees, and approved the payment which had already been made by the Joint Administrators to their attorneys of over Twenty Five Thousand ($25,000.00) Dollars, and in the same ruling held that the District Court did not have jurisdiction of a probate matter, denying the Defendant-Petitioner Patricia R. Smith, the right to have a trial on the issues raised in the Complaint and the Counterclaim, or to file an amended answer and an amended counterclaim to the Plaintiffs-Respondents the Joint Administrators' complaint, in this case, to surcharge and falsify the plaintiffs Joint Administrators' purported final

settlement of their accounts of the Estate of John A. O'Brien in order to determine the validity of their respective claims. This Ruling is unfair; unjust, contrary to the laws, and in violation of the statutes and laws of Kentucky, governing the final settlement of the accounts of an administrator of an estate in Kentucky, and is in conflict with the decisions of the Court of Appeals for the Second Circuit on a similar matter, in the case of *Griffith* v. *Bank of New York, 147 F. 2d 899 (February 16, 1945)*, and the said Ruling is in conflict with the Court of Appeals for the Sixth Circuit, in the case of *Rogers* v. *Girard Trust Company, 150 Fed. 2d 239 (February 7, 1947)*.

The decision and summary judgments of the Court of Appeals for the Sixth Circuit, which affirmed, upheld and modified the judgments of the District Court, *and approved the entire administration of the Estate of John A. O'Brien by these two Trust Companies,* which the District Court granted to the Plaintiffs-Respondents Trust Companies on their Motions for Summary Judgments, *but denying the Defendant-Petitioner Patricia R. Smith, the right of a trial by a jury, on the issues in this case, which were denied and controverted by her in her answer and counterclaim filed in this case, on November 12, 1956,* to the said action which was filed against her by the plaintiffs Trust Companies on September 13, 1956, for the final settlement of their accounts of the Estate of John A. O'Brien, of which the Petitioner Patricia R. Smith is the sole beneficiary, *is a decision of a Federal question,* because it deprived the Defendant-Petitioner Patricia R. Smith, of her property without due process of law, and all of which ruling and conclusions deny the Defendant-Petitioner the equal protection of the laws in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

The said decision of said Court of Appeals in upholding the District Court in taking jurisdiction in the District

Court in an action of a probate matter, in the final settlement of the accounts of an administrator of an estate, and fixing the fees both for the plaintiffs Joint Administrators, and their attorneys, the said fees being based on an unenforcible judgment rendered by a County Commissioner in a County Court, and approved by a County Judge in a County Court in Kentucky, in a "Kangaroo Court" hearing. Years later the plaintiffs Trust Companies admitted to the Court of Appeals, in their brief, and on oral argument, in said Court, that said County (Probate) Court in Kentucky, could not legally enter an *in personam* judgment, upon which an execution may issue for its enforcement, and that the County Judge had no legal right to render a money judgment in a County (Probate) Court in any sum in Kentucky. Therefore, *the defendant Patricia R. Smith* did not, and *could not legally appeal from the said judgment, filed in the County (Probate) Court.* The plaintiffs Trust Companies *never at any time* made an effort to levy an execution. (The effect of the law consists in Execution) to collect said County Court judgment, which was filed and entered on March 5, 1952, in the Jefferson County Court, and amended on May 1, 1952, yet four years, six months, and eight days had passed but no execution was issued) before the within action was filed against the defendant Patricia R. Smith, by the plaintiffs Trust Companies, on September 13, 1956, which is the Trust Companies' third settlement suit filed by them in the O'Brien Estate, which incorporated the said unenforcible judgment in their complaint; had the judgment been good this suit would not have been filed to collect fees. The decision of the Court of Appeals being consistently wrong and in error wherein the Court of Appeals upheld the District Court. Thus denying the defendant *Patricia R. Smith, the right to surcharge and falsify the purported final settlement of the accounts of the said Estate,* filed by the Joint Administra-

tors, *and denied the Defendant-Petitioner Patricia R. Smith the right of a trial on the issues of this case,* said ruling was in violation of the Kentucky Revised Statutes and laws of Kentucky governing the final settlement of the accounts of an administrator of an estate in Kentucky, *which was and is an important state question, which is in conflict with the applicable statutes and laws of the State of Kentucky,* as we have clearly shown in this Petition.

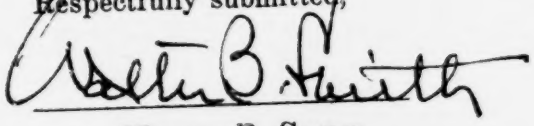
4. The said decision of said Court of Appeals in upholding the District Court as to the right of the plaintiffs Trust Companies the Joint Administrators of the Estate of John A. O'Brien, to file an amended reply to the defendant Patricia R. Smith's original counterclaim, *three years after the counterclaim was filed, said amended reply of the Trust Companies consisting of one hundred fifty nine printed pages, including six Exhibits, but denying the defendant, Patricia R. Smith, the right to file any amendments to her original answer or her original counterclaim,* filed in this case, is in violation of Rule 15, of the Federal Rules of Civil Procedure, such rulings have so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The right to be heard is one of the fundamental rights of due process. The Court of Appeals sustained a denial of the due process guaranteed by the Fourteenth Amendment to the Federal Constitution. The failure of the District Court and the Court of Appeals to grant this petitioner a trial on the issues in this action, and the right to file an amended answer and an amended counterclaim to surcharge and falsify the joint administrators purported final settlement of their accounts of the estate of John A. O'Brien or to remand this action to Jefferson Circuit Court, constituted an abuse of discretion so marked as to warrant the exercise by this court of its power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of Certiorari should be granted.

Respectfully submitted,



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